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INTRODUCTION

Volume II of the Criminal Law Digest contains selected cases issued by the West Virginia Supreme Court of Appeals from September 1, 1982 through April 30, 1985. The types of cases selected are primarily those in which Public Legal Services Council is authorized to provide, i.e., criminal, juvenile, abuse and neglect, paternity, contempt and mental hygiene matters. DUI administrative appeals and legal ethics cases are also included since many issues raised therein are applicable to criminal matters. Cases are cross-indexed throughout according to the issues discussed by the Court.

We have attempted to index all relevant cases handed down by the West Virginia Supreme Court withing the heretofore mentioned time period. We suggest, however, that because of the possibility of errors you not rely exclusively on this Digest when doing research. If you note an error, please contact this office. (304) 558-3905).

In briefing the cases, we have attempted to be faithful to the language of the Court. Taking statements out of context, however, may distort their meaning. Also, since we used slip opinions in summarizing these cases, revision by the Court may have occurred subsequent to publication of this Digest. We again suggest that the summary of the case not be used as a substitute for a thorough reading of the case.

We welcome comments or suggestions on this material and any ideas you may have regarding future projects for the research center to undertake to assist practitioners.

State v. Collins

Two different opinions have been published in the case of *State v. Collins*, No. 15767. They can be found at 327 S.E.2d 125 (1984) and 329 S.E.2d 839 (1984). Because of this confusion a summary of *Collins* has not been included in the main text of Volume II of the Digest. It will be summarized and indexed in Volume III.

TABLE OF CONTENTS

PAGE(S)

ABDUCTION

Double jeopardy

Abduction/sexual assault

State v. Trail, 328 S.E.2d 671 (1985) (Brotherton, J.)

See DOUBLE JEOPARDY Abduction/sexual assault, (p. 126) for discussion of topic.

ABUSE AND NEGLECT

In general

State v. T.C., 303 S.E.2d 685 (1983) (Miller, J.)

Footnote 2- Ordinarily, whether or not the state has filed criminal charges in regard to child abuse is irrelevant in a proceeding under *W.Va. Code* 49-6-1 *et seq.*, to remove custody of the child. *In the Interest of Black,* 273 Pa. Super. 536, 417 A.2d 1178 (1980). The purpose of the removal proceeding is to protect the well- being of the child.

Competency of child to testify

Burdette v. Lobban, 323 S.E.2d 601 (1984) (Neely, J.)

Syl. pt. 2- When a child's capacity to testify that she was the victim of a sexual abuse or neglect is present, the court should appoint a neutral child psychologist or psychiatrist to conduct a transcribed or otherwise recorded interview.

The Court found the trial court may not force the child to be interviewed by the psychologist or psychiatrist alone unless both the court and the guardian *ad litem* agree that the interview be conducted in that manner. The Court found the corollary to the position that the guardian *ad litem* give permission is that the trial court can refuse to allow the child to be a witness in the absence of an unimpeded interview with a child psychologist or psychiatrist who could then give some assurance of competency. The interview should be transcribed or recorded in an unobtrusive manner unless waived by the parties to the proceeding.

Emergency taking

State v. T.C., 303 S.E.2d 685 (1983) (Miller, J.)

See ABUSE AND NEGLECT Termination of parental rights, Finding of abuse or neglect, (p. 4) for discussion of topic.

ABUSE AND NEGLECT

Right to counsel

Interrogation of child

Burdette v. Lobban, 323 S.E.2d 601 (1984) (Neely, J.)

A five year old girl was the alleged victim of sexual abuse by her father. The trial court ordered that the counsel for the parents and the guardian *ad litem* for the child be permitted to interview the child together and then privately.

Syl. pt. 1- Under *W.Va. Code* 49-6-2 (a) [1984] a child who is the alleged victim of sexual abuse may not be interrogated at any time during the abuse or neglect proceeding without the presence of her counsel unless counsel waives that right on behalf of the child.

Termination of parental rights

In general

State v. C.N.S., 319 S.E.2d 775 (1984) (McGraw, J.)

Syl. pt. 1- "Though constitutionally protected, the right of the natural parent to the custody of minor children is not absolute and may be limited or terminated by the State, as *parens patriae*, if the parent is proven unfit to be entrusted with child care." Syllabus Point 5, *In re Willis*, 157 W.Va. 225, 207 S.E.2d 129 (1973).

Burden of proof

State v. Carl B., 301 S.E.2d 864 (1983) (Per Curiam)

Applies standard set forth in Syl. Pt. 1, *In the Interest of S.C.*, 284 S.E.2d 867 (W.Va. 1981). (Found in Vol. I under this topic.)

State v. C.N.S., 319 S.E.2d 775 (1984) (McGraw, J.)

Applies standards set forth in Syllabus point 1, in part, *In the Interest of S.C.*, 284 S.E.2d 867 (W.Va. 1981). (Found in Vol. I under this topic.)

ABUSE AND NEGLECT

Termination of parental rights (continued)

Burden of proof (continued)

See ABUSE AND NEGLECT Termination of parental rights, Finding of abuse and neglect, (p. 5) for discussion of topic.

Finding of abuse or neglect

State v. T.C., 303 S.E.2d 685 (1983) (Miller, J.)

Syl. pt. 1- In a child abuse and neglect hearing, before a court can begin to make any of the dispositional alternative under *W.Va. Code*, 49-6-5, it must hold a hearing under *W.Va. Code*, 49-6-2, and determine "whether such child is abused or neglected." Such a finding is a prerequisite to further continuation of the case.

The Supreme Court found the primary purpose of making an initial finding of abuse and neglect is to protect the interest of all parties and to justify the continued jurisdiction under Code 49-6-1, *et seq.*

The Court noted it is apparent that the State's right to intervene is predicated upon it's initial showing that there has been child abuse or neglect, which constitutes unfitness on the part of the parents to continue, either temporarily or permanently, in their custodial role.

Here, the hearing under Code 49-6-2 was aborted when the parties entered into some type of voluntary arrangement.

Syl. pt. 2- *W.Va. Code*, 49-6-1, *et seq*., does not foreclose the ability of the parties, properly counseled, in a child abuse and neglect proceeding, to make some voluntary dispositional plan. However, such arrangements are not without restrictions. First, the plan is subject to approval of the court. Second, and of greater importance, the parties cannot circumvent the threshold question which is the issue of the abuse or neglect.

Here the Court found there was error in the lower court procedure in that there was an absence of an initial finding that there had or had not been abuse or neglect. Absent such a finding, the dispositional aspects of the case could not be considered.

ABUSE AND NEGLECT

Termination of parental rights (continued)

Finding of abuse or neglect (continued)

State v. T.C., (continued)

The Supreme Court noted that some confusion could have been engendered in the lower court by the fact that the child had been initially taken into temporary custody under Code 49-6-3 (a). The Court held the parties and the court appeared to conceive that the issue at the hearing was whether temporary custody should be continued. However, the Supreme Court noted that Code 49-6-3 (a) permitting an *ex parte* taking does not provide for a further hearing to determine whether temporary custody should be continued. The Court also noted that while Code 49-6-3 (b) authorizes an alternative procedure for a court to utilize in taking temporary custody by providing for an expedited preliminary hearing with notice to the parents, this procedure does not operate to bypass the hearing to determine neglect or abuse required by Code 49-6-2.

Because there was no initial finding of abuse in this case, the Court remanded with directions that the lower court promptly hold a hearing under Code 49-6-2 in order to determine if the child was abused. The Supreme Court found that after holding the hearing and making findings of fact of whether the child was abused, the lower court should proceed to make an appropriate disposition under Code 49-6-5.

State v. C.N.S., 319 S.E.2d 775 (1984) (McGraw, J.)

The circuit court permanently terminated the parental rights of the appellants over their four children. On appeal, appellants contended the court erred in refusing to return the children to their custody for an improvement period to correct the conditions giving rise to the petition. The appellants contended there was no compelling circumstances specified by the trial judge which would justify the ruling.

The Supreme Court found the circuit court based it's denial of the motion for an improvement period on the conditions of the home and the appellants disregard of the social service agencies' efforts to assist with improving the conditions of neglect. The court noted the past propensity of the family to change residences and leave the jurisdiction to avoid neglect charges.

ABUSE AND NEGLECT

Termination of parental rights (continued)

Finding of abuse or neglect (continued)

State v. C.N.S., (continued)

The Supreme Court found the circuit court demonstrated sufficient justification on the record for refusing the motion and the evidence supported the finding that a potential danger existed to the welfare of the children if they were returned to the appellants.

The appellants also contended the court abused its discretion in terminating parental rights.

Syl. pt. 3- The State must produce clear and convincing evidence that there is "no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected in the near future" before a circuit court may sever the custodial rights of the natural parents pursuant to *W.Va. Code* 49-6-5 (1980 Replacement Vol.).

The Court found the appellants did not seriously contend the lower court erred in finding the children were neglected within the meaning of the statute. The Court found the appellants did assert the court erred in failing to consider less restrictive dispositional alternatives than termination of parental rights and that the State did not meet its burden of showing "no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected".

Syl. pt. 4- "Termination of parental rights, the most drastic remedy under the statutory provision covering the disposition of neglected children, *W.Va. Code*, 49-6-5 [1977] may be employed without the use of intervening less restrictive alternatives when it is found that there is no reasonable likelihood under *W.Va. Code*, 49-6-5 (b) [1977] the conditions of neglect or abuse can be substantially corrected". Syllabus Point 2, *In re R.J.M.*, 226 S.E.2d 114 (W.Va. 1980).

ABUSE AND NEGLECT

Termination of parental rights (continued)

Findings of abuse or neglect (continued)

State v. C.N.S., (continued)

The Supreme Court found that they could not say the trial court abused its discretion in finding "no reasonable likelihood that the conditions of neglect can be substantially corrected" and in terminating the appellants' parental rights. The Court found the appellants did not respond to or follow through with rehabilitation measures recommended by social service agencies working with them. The Court found this finding was supported by the evidence. The Court found the State also showed the appellants' failure to respond to the Department's recommendations resulted from a limited ability to comprehend the necessity to improve the quality of the care they were providing to their children. The Court found the State produced clear and convincing evidence to show the appellants failed to respond to or follow through with the Department's efforts to help them correct the conditions of neglect and that the appellants were intellectually incapable of correcting the condition in the future.

Improvement period

In re Thaxton, 304 S.E.2d 864 (1983) (Per Curiam)

Applies standards set forth in Syl. Pt. 3, *State v. Scrithfield*, 280 S.E.2d 315 (W.Va. 1981). (Found in Vol. I under this topic.)

The trial court ordered that permanent custody be given to the Department of Welfare and terminated the appellant's parental rights. The Supreme Court found the appellant was entitled to the granting of her motion for improvement period absent a finding of compelling circumstances. Since the trial court did not set forth any such reasons on the record, the Supreme Court concluded the appellant was entitled to an improvement period.

State v. C.N.S., 319 S.E.2d 775 (1984) (McGraw, J.)

See ABUSE AND NEGLECT Termination of parental rights, Finding of abuse and neglect, (p. 5) for discussion of topic.

ABUSE AND NEGLECT

Termination of parental rights (continued)

Less restrictive dispositions

State v. C.N.S. 319 S.E.2d 775 (1984) (McGraw, J.)

See ABUSE AND NEGLECT Termination of parental rights, Finding of abuse and neglect, (p. 5) for discussion of topic.

Right to counsel

State v. Carl B., 301 S.E.2d 864 (1983) (Per Curiam)

When children are first taken in an emergency situation, immediate appointment of counsel was not necessary.

Where a mother was represented by court-appointed counsel at a hearing following the initial emergency taking, her claim that the trial court failed to appoint an attorney for her within the time required by *W.Va. Code* § 49-6-2 (a) (1977), was without basis.

Sufficiency of evidence

State v. Carl B., 301 S.E.2d 864 (1983) (Per Curiam)

W.Va. Code § 49-6-5 (1977), governs the final disposition of cases of child neglect or abuse. Unlike 49-6-3, 49-6-5 requires no finding that the children were in imminent danger. Rather, it requires that the court find the children had been neglected or abused and that there was no reasonable likelihood that the conditions of neglect or abuse would be corrected in the near future. The Court made such a finding.

Reports of unsanitary home conditions, improper clothing, and improper nutrition were sufficient to establish by clear and convincing evidence that appellant neglected her children. Where the conditions persisted despite repeated improvement periods of financial and homemaking assistance, trial court's finding that there was no reasonable likelihood that the conditions of neglect or abuse would be corrected in the near future was supported by the evidence.

ABUSE AND NEGLECT

Termination of parental rights

Sufficiency of evidence (continued)

State v. C.N.S., 319 S.E.2d 775 (1984) (McGraw, J.)

See ABUSE AND NEGLECT Termination of parental rights, Finding of abuse and neglect, (p. 5) for discussion of topic.

Voluntary dispositional plan

State v. T.C., 303 S.E.2d 685 (1983) (Miller, J.)

See ABUSE AND NEGLECT Termination of parental rights, Finding of abuse or neglect, (p. 4) for discussion of topic.

ABUSE OF DISCRETION

Abuse and neglect

State v. C.N.S., 319 S.E.2d 775 (1984) (McGraw, J.)

See ABUSE AND NEGLECT Termination of parental rights, Finding of abuse or neglect, (p. 5) for discussion of topic.

Change of venue

State v. Zaccagnini, 308 S.E.2d 131 (1983) (Miller, J.)

See VENUE Change of venue, Standards, (p. 583) for discussion of topic.

Closing statements

State v. Flint, 301 S.E.2d 765 (1984) (Miller, J.)

See DENIAL OF A FAIR TRIAL Prosecutor's comments, (p. 98) for discussion of topic.

Competency to stand trial

State v. Watson, 318 S.E.2d 603 (1984) (Miller, J.)

See COMPETENCY To stand trial, (p. 59) for discussion of topic.

Confession

State v. Sparks, 298 S.E.2d 857 (1982) (Per Curiam)

See SELF-INCRIMINATION - STATEMENTS BY DEFENDANT Voluntariness, Inducement or coercion, (p. 506) for discussion of topic.

ABUSE OF DISCRETION

Continuance

State v. Flint, 301 S.E.2d 765 (1983) (McHugh, J.)

See CONTINUANCE Abuse of discretion, (p. 71) for discussion of topic.

State v. Hodges, 305 S.E.2d 278 (1983) (McHugh, J.)

See CONTINUANCE Misunderstanding in plea negotiations, (p. 73) for discussion of topic.

State v. Angel, 319 S.E.2d 388 (1984) (Per Curiam)

See INEFFECTIVE ASSISTANCE Inadequate time to prepare, (p. 279) for discussion of topic.

Determination of competency of child witness

State v. Watson, 318 S.E.2d 603 (1984) (Miller, J.)

See WITNESSES Competency of children to testify, (p. 599) for discussion of topic.

Discovery

State v. Fairchild, 298 S.E.2d 110 (1982) (McGraw, J.)

See DISCOVERY Bill of particulars, (p. 107) for discussion of topic.

State v. Louk, 301 S.E.2d 596 (1983) (Harshbarger, J.)

See DISCOVERY Right to grand jury minutes and transcript, (p. 120) for discussion of topic.

ABUSE OF DISCRETION

Discovery (continued)

State v. Meadows, 304 S.E.2d 831 (1983) (McHugh, J.)

See DISCOVERY Bill of particulars, (p. 107) for discussion of topic.

Discovery in habeas corpus proceeding

Gibson v. Dale, 319 S.E.2d 806 (1984) (McGraw, J.)

See HABEAS CORPUS Discovery, (p. 212) for discussion of topic.

Display of items not in evidence

State v. Kopa, 311 S.E.2d 412 (1983) (McHugh, J.)

See EVIDENCE Display of items not in evidence, (p. 161) for discussion of topic.

Evidence

In general

State v. Louk, 301 S.E.2d 596 (1983) (Harshbarger, J.)

See EVIDENCE Victim-character and reputation, (p. 198) for discussion of topic.

State v. Ashcraft, 309 S.E.2d 600 (1983) (McGraw, J.)

See EVIDENCE Relevant, Prejudicial, (p. 189) for discussion of topic.

State v. Peyatt, 315 S.E.2d 574 (1983) (McHugh, J.)

See EVIDENCE Sexual conduct, (p. 194) for discussion of topic.

ABUSE OF DISCRETION

Evidence (continued)

Expert witness

State v. Oldaker, 304 S.E.2d 843 (1983) (Harshbarger, J.)

See EVIDENCE Expert witness, (p. 163) for discussion of topic.

Opinion

State v. Pancake, 296 S.E.2d 37 (1982) (Harshbarger, J.)

See EVIDENCE Opinion, Expert witness, (p. 179) for discussion of topic.

Photographs

State v. Dye, 298 S.E.2d 898 (1982) (Per Curiam)

See EVIDENCE Photographs, (p. 182) for discussion of topic.

State v. Audia, 301 S.E.2d 199 (1983) (McHugh, J.)

See EVIDENCE Photographs, (p. 182) for discussion of topic.

Relevant, prejudicial

State v. Oldaker, 304 S.E.2d 843 (1983) (Harshbarger, J.)

See EVIDENCE Relevant, Prejudicial, (p. 188) for discussion of topic.

State v. Kopa, 311 S.E.2d 412 (1983) (McHugh, J.)

See EVIDENCE Relevant, Prejudicial, (p. 190) for discussion of topic.

ABUSE OF DISCRETION

Evidence (continued)

Reputation for truth and veracity

State v. Zaccagnini, 308 S.E.2d 131 (1983) (McHugh, J.)

See EVIDENCE Reputation for truth and veracity, (p. 192) for discussion of topic.

Sexual conduct

State v. Peyatt, 315 S.E.2d 574 (1983) (McHugh, J.)

See EVIDENCE Sexual conduct, (p. 194) for discussion of topic.

Indigent's expenses

State v. Audia, 301 S.E.2d 199 (1983) (McHugh, J.)

See INDIGENTS Expenses, Exceeding the statutory limit, (p. 263) for discussion of topic.

Insanity

Right to psychiatric evaluation

State v. Flint, 301 S.E.2d 765 (1983) (McHugh, J.)

See INSANITY Right to psychiatric evaluation, (p. 290) for discussion of topic.

State v. Watson, 318 S.E.2d 603 (1984) (Miller, J.)

See COMPETENCY To stand trial, (p. 59) for discussion of topic.

ABUSE OF DISCRETION

Jury

Bias

State v. Dye, 298 S.E.2d 898 (1982) (Per Curiam)

See JURY Interference with juror, (p. 332) for discussion of topic.

State v. Audia, 301 S.E.2d 199 (1983) (McHugh, J.)

See JURY Challenges, Cause, (p. 321) for discussion of topic.

Discharge of juror

State v. Oldaker, 304 S.E.2d 843 (1983) (Harshbarger, J.)

See JURY Discharge of juror, (p. 331) for discussion of topic.

Sequestration

State v. Young, 311 S.E.2d 118 (1983) (McGraw, J.)

See JURY Sequestration, (p. 336) for discussion of topic.

Juvenile

Confinement

State ex rel. G.W.R. v. Scott, 317 S.E.2d 504 (1984) (Per Curiam)

See JUVENILES Confinement, Superintendent's recommendation, (p. 345) for discussion of topic.

ABUSE OF DISCRETION

Leading questions

State v. Fairchild, 298 S.E.2d 110 (1982) (McGraw, J.)

See WITNESSES Leading questions, (p. 616) for discussion of topic.

Mistrial

State v. Williams**,** 305 S.E.2d 251 (1983) (McGraw, J.)

See MISTRIAL Prejudicial publicity, (p. 382) for discussion of topic.

New trial- newly discovered evidence

State v. Sparks**,** 298 S.E.2d 857 (1982) (Per Curiam)

See NEW TRIAL- NEWLY DISCOVERED EVIDENCE In general, (p. 389) for discussion of topic.

Pre-indictment delay

State v. Bennett**,** 304 S.E.2d 28 (1983) (Per Curiam)

See PRE-INDICTMENT DELAY In general, (p. 408) for discussion of topic.

Rebuttal

State v. Peyatt**,** 315 S.E.2d 574 (1983) (McHugh, J.)

See EVIDENCE Rebuttal, (p. 186) for discussion of topic.

State v. Boykins, 320 S.E.2d 134 (1984) (Per Curiam)

See WITNESSES Rebuttal, (p. 616) for discussion of topic.

ABUSE OF DISCRETION

Recess

State v. Richey, 298 S.E.2d 879 (1982) (Miller, C.J.)

Syl. pt. 8- A trial court has considerable discretion as to matters involving the length of a recess or temporary adjournment of a trial.

A trial court is accorded a considerable discretion in the trial of a case in order to handle the manifold exigencies that may arise. *State v. Burton*, 254 S.E.2d 129 (W.Va. 1979).

In this case the trial court declared a recess for the Christmas holidays from Thursday, December 20 to Wednesday, December 26. The recess occurred during the defense side of the case. The reason for the recess was that a number of civil matters had been scheduled for Friday and the judge felt he could not postpone those hearings, and the judge decided that the jury should not have to serve the day before Christmas.

The Supreme Court did not believe the trial court abused its discretion in declaring the recess.

Surrebuttal

State v. Oldaker, 304 S.E.2d 843 (1983) (Harshbarger, J.)

See EVIDENCE Rebuttal, (p. 186) for discussion of topic.

Venue

See VENUE Change of venue, Abuse of discretion, (p. 576) for discussion of topic.

ABUSE OF DISCRETION

Voir dire

State v. Toney, 301 S.E.2d 815 (1983) (Per Curiam)

See *VOIR DIRE* Abuse of discretion, (p. 589); *VOIR DIRE* Individual, (p. 590) for discussion of topic.

State v. Ashcraft, 309 S.E.2d 600 (1983) (McGraw, J.)

See *VOIR DIRE* Individual, (p. 591) for discussion of topic.

State v. Angel, 319 S.E.2d 388 (1984) (Per Curiam)

See *VOIR DIRE* Individual, (p. 593) for discussion of topic.

Witnesses

Impeachment

State v. Sparks, 298 S.E.2d 857 (1982) (Per Curiam)

See WITNESSES Impeachment, Prior inconsistent statements, (p. 610) for discussion of topic.

ACCESSORY, AIDING AND ABETTING, PRINCIPAL

In general

State v. Dameron, 304 S.E.2d 339 (1983) (Per Curiam)

Syl. pt.- "'An accessory before the fact is a person who is being absent at the time and place of the crime, procures, counsels, commands, incites, assists or abets another person to commit the crime, and absence at the time and place of the crime is an essential element of the status of an accessory before the fact.' Point 2, Syllabus, *State ex rel. Brown v. Thompson*, 149 W.Va. 649, 142 S.E.2d 711 (1965)." Syl. pt. 2, *State v. Nicholson*, 252 S.E.2d 894 (W.Va. 1979), overruled on other grounds, *State v. Petry*, 273 S.E.2d 346 (W.Va. 1980).

Breaking and entering

State v. Tadder, 313 S.E.2d 667 (1984) (McHugh, C.J.)

See BREAKING AND ENTERING Aiding and abetting, Sufficiency of evidence, (p. 50) for discussion of topic.

Controlled substances

State v. Dameron, 304 S.E.2d 339 (1983) (Per Curiam)

See CONTROLLED SUBSTANCES Delivering, (p. 75) for discussion of topic.

ACCESSORY, AIDING AND ABETTING, PRINCIPAL

Indictment

State v. Audia, 301 S.E.2d 199 (1983) (McHugh, J.)

The appellant contended the trial court should have squashed the indictment or directed a verdict in his favor, in that the evidence showed him to have been an aider and abettor who could not be convicted upon an indictment charging him solely as a principal in the first degree. Appellant was tried before the decision in *State v. Petry*, 273 S.E.2d 346 (W.Va. 1980) which held it would no longer be necessary to indict an aider and abettor as such.

The Supreme Court found the State did present evidence which would sustain a conviction under the indictment, and the trial court did not err.

ALIBI

See DEFENSES Alibi, (p. 87) for discussion of topic.

APPEAL

Constitutional error

State v. Wyer, 320 S.E.2d 92 (1984) (Miller, J.)

Appellant was convicted of sexual assault in the first degree. He alleged trial counsel was ineffective because at the suppression hearing he failed to argue that the defendant's confession was taken in violation of his Sixth Amendment right to counsel. The Supreme Court declined to analyze this error under the doctrine of ineffective assistance of counsel. See footnote 16. However, because the claim is of constitutional dimension, the Court found they could, under syl. pt. 18, of *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974), address the issue:

> "Where it appears that previously unassigned prejudicial errors involving fundamental constitutionally protected rights of an accused occurred at trial, these errors void the jurisdiction of the trial court to render a valid judgement and, as such, plainly command the notice of the appellate court."

Failure to designate record

State v. Cox, 297 S.E.2d 825 (1982) (Per Curiam)

Footnote - The appellant indicated in his petition for appeal that a juror testified at the hearing on his motion for anew trial based on improper communications with jurors. The only record presented to the Supreme Court of the hearing was that which accompanied the State's motion to supplement the record. There was no transcript of the juror's testimony and no indication she was called as a witness. The Supreme Court found that the appellant had an opportunity to make an additional designation within ten days of the state's motion. R.Sup.- Ct.App. 8 (a) (3). No such additional designation was made, and the Supreme Court found they had to decide the case on the record before them.

APPEAL

Failure to preserve for appeal

In general

Carter v. Taylor, 310 S.E.2d 213 (1983) (Per Curiam)

Syl. pt. 1- "As a general rule, proceedings of trial courts are presumed to be regular, unless the contrary affirmatively appears upon the record, and errors assigned for the first time in the appellate court will not be regarded in any matter of which the trial court had jurisdiction or which might have been remedied in the trial court if objected to there." Syllabus Point 17, State v. Thomas, 157 W.Va. 640, 203 S.E.2d 445 (1974).

Errors not documented in record

State v. Audia, 301 S.E.2d 199 (1983) (McHugh, J.)

Footnote 3- The appellant claimed that a juror should have been excused because he admitted he had heard that a co-defendant was convicted of the same offense the day before. The Supreme Court found the allegation was not supported by the record and they would not consider it.

Failure to assert purpose for which evidence intended

State v. Foster, 300 S.E.2d 291 (1983) (Neely, J.)

See WITNESSES Impeachment, In general, (p. 602) for discussion of topic.

Failure to develop record

State v. Neider, 295 S.E.2d 902 (1982) (Miller, C.J.)

Several *veniremen* indicated during *voir dire* that they had read about a jail-break. In footnote 8, the Supreme Court found that for some of the questions posed on the individual *voir dire*, it was possible to surmise that the defendant may have been involved in the jailbreak. The Court found that the lack of a well-developed record on this point would perhaps alone be sufficient to preclude consideration of this ground of error.

Failure to preserve for appeal (continued)

Failure to object

State v. Fairchild, 298 S.E.2d 110 (1982) (McGraw, J.)

See SELF-INCRIMINATION- STATEMENTS BY DEFENDANT Statements made upon legal examination, (p. 488) for discussion of topic.

See WITNESSES Leading questions, (p. 616) for discussion of topic.

State v. Sparks, 298 S.E.2d 857 (1982) (Per Curiam)

See DENIAL OF A FAIR TRIAL Prosecutor's comments/conduct, (p. 96) for discussion of topic.

State v. Mullins, 301 S.E.2d 173 (1982) (Per Curiam)

See SELF- DEFENSE Burden of proof, Retroactivity, (p. 478) for discussion of topic.

The defendant assigned as error the trial court's decision to permit a medical examiner who examined the deceased's body to testify that the manner of death was homicide. The Supreme Court found that there was no objection to this at the trial, which in the absence of plain error, precluded their consideration of the point on appeal.

In re Yoho, 301 S.E.2d 581 (1983) (Harshbarger, J.)

See CONTEMPT Due process, (p. 66) for discussion of topic.

State v. Bennett, 304 S.E.2d 28 (1983) (Miller, J.)

See JURY Venire, (p. 338) for discussion of topic.

APPEAL

Failure to preserve for appeal (continued)

Failure to object (continued)

State v. Beckett, 310 S.E.2d 883 (1983) (Miller, J.)

See WITNESSES Impeachment, Prior convictions, (p. 610) for discussion of topic.

State v. Watson, 318 S.E.2d 603 (1984) (Miller, J.)

See EVIDENCE Collateral crimes, (p. 159) for discussion of topic.

Johnson v. State, 318 S.E.2d 616 (1984) (Per Curiam)

Syl. pt. 3- "Ordinarily, an objection to and incompetent, improper or hearsay evidence should have been made at a trial or hearing before the admission of any such evidence can be later urged as error on appeal." Syllabus Point 1, *Evans v. State Compensation Director*, 150 W.Va. 161, 144 S.E.2d 663 (1965).

State v. Wyant, 328 S.E.2d 174 (1985) (Per Curiam)

See EVIDENCE Scientific tests, (p. 193) for discussion of topic.

State v. Clements, 334 S.E.2d 600 (1985) (Brotherton, J.)

See EVIDENCE Tape-recording, (p. 196) for discussion of topic.

State v. Cabalceta, 324 S.E.2d 383 (1984) (Per Curiam)

See DENIAL OF A FAIR TRIAL Prosecutor's conduct/comments, (p. 103) for discussion of topic.

APPEAL

Failure to pursue motion

State v. Cabalceta, 324 S.E.2d 383 (1984) (Per Curiam)

Appellant was convicted of manufacturing marijuana. She contends the trial court erred in failing to grant her motion for a jury view of the farm where the marijuana was discovered. Prior to trial, the appellant filed a motion for a view. The motion was repeated orally at the beginning of the trial at which time the trial judge said he would consider it later. Defense counsel did not pursue the matter. The Court found there was no error because the motion was abandoned. The Court noted evidence of the relative locations of the marijuana patch and the farmhouse were adduced through oral testimony.

Failure to request *in camera* hearing

State v. Richey, 298 S.E.2d 879 (1982) (Miller, C.J.)

See EVIDENCE Flight, (p. 164) for discussion of topic.

Invited error

State v. Richey, 298 S.E.2d 879 (1982) (Miller, C.J.)

See SEXUAL ASSAULT Instructions, (p. 549) for discussion of topic.

Mandamus

State ex rel. Ash v. Randall, 301 S.E.2d 832 (1984) (McHugh, J.)

See MANDAMUS Appellate review, (p. 377) for discussion of topic.

Plain error

State v. Wyer, 320 S.E.2d 92 (1984) (Miller, J.)

See APPEAL Constitutional error, (p. 22) for discussion of topic.

APPEAL

Review of sentence

State v. Bennett, 304 S.E.2d 28 (1983) (Per Curiam)

See SENTENCING Review of sentence, (p. 546) for discussion of topic.

Right to appeal

Right to transcript

State v. Neal, 304 S.E.2d 342 (1983) (McHugh, J.)

See TRANSCRIPT What must be transcribed, (p. 567) for discussion of topic.

Trial error

State v. Pancake, 296 S.E.2d 37 (1982) (Harshbarger, J.)

"A verdict of guilty in a criminal case will not be reversed in this Court because of error committed by trial court, unless this error is prejudicial to the accused (citation omitted)". Syl. pt. 2, *State v. Blaney*, 284 S.E.2d 920 (W.Va. 1981).

ARRAIGNMENT

In general

State ex rel. Harper v. Zegeer, (addendum on rehearing) 296 S.E.2d 873 (1982) (Harshbarger, J.)

Syl. pt. 1- Presentment before a judicial officer before incarceration on a criminal charge is basic to due process.

Syl. pt. 2- It is the law of West Virginia that no person may be imprisoned or incarcerated prior to presentment before a judicial officer and the issuance of a proper commitment order.

See PUBLIC INTOXICATION Incarceration of alcoholics, (p. 431) for discussion of topic.

ARREST

By conservation officers

State v. Boggess, 309 S.E.2d 118 (1983) (McHugh, J.)

See CONTROLLED SUBSTANCES Possession with intent to manufacture or deliver, (p. 81) for discussion of topic.

Warrant

Probable cause

In the Matter of Monroe, 327 S.E.2d 163 (1985) (McHugh, J.)

Syl. pt. 3- The determination of whether probable cause exists to support the issuance of an arrest warrant under *W.Va.R.Crim.P.* 4 is solely a judicial function to be performed by the magistrate and is to be based upon the contents if "the complaint, or from an affidavit or affidavits filed with the complaint."

The Supreme Court disapproved of the procedure in Wood County Magistrate Court of requiring a police investigation prior to a finding of probable cause and the issuance of an arrest warrant in felony cases.

State v. Schofield, 331 S.E.2d 829 (1985) (Neely, C.J.)

Syl. pt. 1- An affidavit stating only that the victim was "shot to death" does not enable a magistrate to find sufficient probable cause to issue an arrest warrant.

Appellant contends the trial court erred in admitting post-arrest statements into evidence since these statements were the product of an illegal arrest and were thus fruit of the poisonous tree.

ARREST

Warrant (continued)

Probable cause (continued)

State v. Schofield, (continued)

The Court found an affidavit for an arrest warrant that stated only that the victim was shot to death does not enable a magistrate to conclude that sufficient probable cause exists for him to issue the warrant and that a magistrate cannot be a rubber stamp for the police. The Court found the magistrate issuing the warrant must make an independent judicial decision for himself based upon the information provided to him by the police before he can issue a warrant. The Court concluded, however, the appellant's arrest, pursuant to an invalid arrest warrant, at the home of a third party was permissible because the arresting officers had reasonable grounds to believe that she had committed a felony.

See SELF-INCRIMINATION - STATEMENTS BY DEFENDANT Voluntariness, Illegal arrest, (p. 502) for discussion of topic.

Who may issue

State ex rel. Hill v. Smith, 305 S.E.2d 771 (1983) (Harshbarger, J.)

Municipal character provisions that authorize law enforcement officers, municipal clerks or their deputies to issue arrest warrants are invalid because they conflict with and exceed powers legislatively granted to municipalities. *W.Va. Code*, 8-10-1 and 2; *W.Va Const.* Art. VIII, § 12. The Syllabus in *State ex rel. Sahley v. Thompson*, 151 W.Va. 336, 151 S.E.2d 870 (1966), is overruled.

ARREST

Warrantless

In general

State v. White, 301 S.E.2d 615 (1983) (Per Curiam)

Where troopers, following a stabbing death in defendant's residence, asked defendant to come with them and she agreed, there was no illegal arrest.

Felony committed in officer's presence

State v. Farmer, 315 S.E.2d 392 (1983) (Neely, J.)

See ARREST Warrantless, Home entries, (p. 31) for discussion of topic.

Home entries

State v. Farmer, 315 S.E.2d 392 (1983) (Neely, J.)

Appellant appeals the revocation of his probation on the grounds that the evidence used to sustain the revocation should have been excluded.

In this case, the sheriff's department received a complaint that some vehicles had been broken in to and that certain items had been stolen from the van. A witness observed people running from the van toward a passenger car with a certain license number. The same morning the reported license number was fed into the computer at the sheriff's department and it was indicated that the car was owned by the appellant. The vehicles description matched the description given in the complaint.

Two officers of the sheriff's department went to the vicinity of the appellant's residence and asked where they could find him. They were told the appellant was living with his ex-wife. When the officers arrived at the address given to them, they observed a vehicle meeting the description with a license number matching the one that had been given by the witness. The officers checked the locked vehicle from the outside and observed certain items matching those reported stolen. The officers went to a neighboring house and were again advised that the appellant was living next door with his ex-wife.

ARREST

Warrantless (continued)

Home entries (continued)

State v. Farmer, (continued)

The officers went to the ex-wife's house and knocked. Immediately after knocking the officers saw the appellant jump out of the bed and run through the house. The officers continued knocking for approximately thirty minutes, and the appellants ex-wife came to the door and denied the appellant was present inside. The officers informed her the appellant had been observed inside the house and that the officers were going to arrest him. One of the officers entered the house and found the appellant hiding in a closet. The officer placed the appellant under arrest and orally advised him of his rights. The appellant was told that a search warrant would be obtained to search his car. The appellant said he would allow his ex-wife to open the trunk. The appellant gave her the key which she used to open the trunk. Inside the vehicles trunk were articles later identified as stolen. The appellant's ex-wife then unlocked the passenger compartment and handed the officer the other merchandise which had been in plain view.

Appellant contended his arrest without a warrant was illegal and that the subsequent search of his vehicle, although pursuant to his consent, was also illegal as the fruit of an illegal arrest.

Syl. pt. 1- Syllabus point 1 of *State v. Canby*, 252 S.E.2d 164 (W.Va. 1979), which covers arrests without warrants, requiring both probable cause to believe that a felony has been committed and exigent circumstances, is limited to arrests made in the home.

The Supreme Court found in this case there was overwhelming probable cause to believe that a crime had been committed and that the appellant had committed it. Furthermore, they found the Circuit Court heard testimony concerning whether exigent circumstances existed to justify a legal warrantless arrest and concluded that they did.

ARREST

Warrantless (continued)

Home entries (continued)

State v. Farmer, (continued)

The deputies testified they were the only two deputy sheriffs on duty for on-the-road work at the time and that if one of them had returned to procure arrest and search warrants, the other deputy would have been unable to prevent the appellant from fleeing and, at the same time, protect the evidence in the car from being destroyed. The Supreme Court found that under these circumstances, where both the appellant and his ex-wife were cooperating in an effort to hide the appellant form the police, they could not conclude that the trial court was wrong in determining that one deputy could not both prevent the appellant from fleeing and guard the evidence.

The Court found that because both probable cause and exigent circumstances not created by the officers existed they affirmed the holding that the warrantless arrest was lawful.

Syl. pt. 2- In order for police officers to make an arrest without a warrant in the home of a suspect, they must have had at the time of the arrest sufficient reliable evidence that they could have made a strong showing of probable cause, and, in addition, there must be exigent circumstance, not of the police officers' creation, which militate in favor of immediate arrest. In addition, a police officer may always make a warrantless arrest for a felony committed in his presence or when there is an outstanding warrant for the individual arrested, although the warrant may not be in the possession of the arresting officer.

Home of third party

State v. Schofield, 331 S.E.2d 829 (1985) (Neely, C.J.)

Appellant was arrested in her brother's trailer. The Court found although she was "the target" of the police entry into her brother's trailer and was legitimately on the premises at his request, no privacy expectation protected by *W.Va. Const.* Art. III, § 6 and the Fourth Amendment existed that applied to her. The Court found the arrest warrant was defective, but the appellant

ARREST

Warrantless (continued)

Home of third party (continued)

State v. Schofield, (continued)

was a visitor to her brother's trailer without any authority or control over the premises or any interest in the premises. The Court noted even if a breach of her brother's privacy interest could somehow be found, appellant would not be able to rely on such a breach to exclude evidence from her own trial since Fourth Amendment rights are personal rights. The Court found the arresting officers had a plethora of evidence before them to infer that the appellant had committed a felony and that abundant probable cause existed to arrest her despite the absence of a proper arrest warrant.

The Court found that since the appellant was not arrested in her own home, the strictures of the U.S. Supreme Court requiring a valid warrant absent exigent circumstances *to arrest a person in his own home are in applicable*. *Peyton v. New York*, 445 U.S. 573 (1980).

The Court found although the appellant did not have a legitimate expectation of privacy while visiting her brother in his trailer, the appellant contended the police needed a search warrant to justify entering her brother's home. The Court found under *Steagald v. U.S.*, 451 U.S. 204 (1981) they would exclude evidence seized in the appellant's brother's trailer only if *that brother* were the subject of ensuing prosecution.

The Court found the brother's trailer in this case was not searched nor entered forcibly. The Court noted a mere entry is even less intrusive than a seizure.

Syl. pt. 2- The appellant's arrest pursuant to an invalid arrest warrant at the home of a third party was nevertheless permissible because the arresting officers had independent, reasonable grounds to believe that she had committed a felony.

ARREST

Warrantless (continued)

Probable cause and exigent circumstances

State v. Sprouse, 297 S.E.2d 833 (1982) (Per Curiam)

Applies standard set forth in syl. pt. 2, *State v. Duvernoy*, 156 W.Va. 578, 195 S.E.2d 631 (1973). See *State v. Drake*, 291 S.E.2d 484 (W.Va. 1982). Found in Vol. I under this topic.

Appellant was convicted of entering without breaking. The Supreme Court found that the evidence adduced by the State in the suppression hearing did not establish probable cause for the arrest.

The appellant had been arrested for public intoxication. Upon his release on that charge, he was detained by police, given *Miranda* warnings and interrogated until he gave a confession for the theft offense. The Supreme Court found that the state did not carry its burden of establishing probable cause for detaining the accused and subjecting him to questioning, and that the confession given was a product of illegal arrest and was therefore inadmissible.

State v. Farmer, 315 S.E.2d 392 (1983) (Neely, J.)

Syl. pt. 1- Syllabus point 1 of *State v. Canby*, 252 S.E.2d 164 (W.Va. 1979), which covers arrests without warrants, requiring both probable cause to believe that a felony has been committed and exigent circumstances, is limited to arrests made in the home.

See ARREST Warrantless, Home entries, (p. 31) for discussion of topic.

State v. Runner, 310 S.E.2d 481 (1983) (McGraw, C.J.)

See PUBLIC INTOXICATION Arrest, Probable cause, (p. 429) for discussion of topic.

ARREST

Warrantless (continued)

Public intoxication

State v. Runner, 310 S.E.2d 481 (1983) (McGraw, C.J.)

See PUBLIC INTOXICATION Arrest, Probable cause, (p. 429) for discussion of topic

Public place

State v. Howerton, 329 S.E.2d 874 (1985) (Miller, J.)

Syl. pt. 4- The right to arrest in public without a warrant, based on probable cause that the person has or is about to commit a felony, is the general if not universal rule in this country.

Sufficient facts for warrantless arrest

Jordan v. Holland, 324 S.E.2d 372 (1984) (Per Curiam)

Relator contended the arrest warrant was issued without probable cause and was based on the fruits of an illegal search. The Supreme Court found no constitutional violation in connection with the search and was unable to ascertain what information the magistrate had when he issued the warrant, and thus could not determine whether the magistrate had probable cause.

The Court found determination of the lawfulness of the arrest warrant was of no consequence since the actual arrest was lawful and the facts of the case were sufficient to support a warrantless arrest.

ARREST

Warrantless (continued)

When a seizure has occurred

State v. Flint, 301 S.E.2d 765 (1983) (McHugh, J.)

Appellant contended the trial court erred in denying his motion to suppress evidence relating to a pistol which was found as a result of a warrantless search of the automobile in which he was a passenger. He contended the request that he exit the vehicle and produce identification amounted to an impermissible seizure.

In this case the officer observed a vehicle being driven in an erratic manner. After following the car for one to two blocks, the office decided, in order to determine the condition of the driver, to stop the car and make an inquiry. After activating his flashing lights and siren, the officer saw the appellant take an object from his waistband or pocket, lean over and place it beneath the front seat. After stopping the car the officer asked the driver, the appellant and the other passenger to exit and produce identification, which they did. The officer checked and received information within minutes that the appellant was wanted for "unlawful killing with a gun." Upon placing the appellant under arrest, the officer looked under the front seat and found the pistol.

The Supreme Court found that the exiting of the appellant from the car did not precipitate the ensuing search. The identification led to the search. The Supreme Court found that while the circumstances surrounding the stopping of the car did not point directly to any criminal activity, they were suspicious enough to permit the officer to request some identification. Given the circum stances of the case, the Court did not believe a finding that a "seizure" of the appellant occurred was warranted, but instead, the officer's action represented a permissible "minimal level of police intrusion." The Court found the assignment of error to be without merit.

ARSON

Lesser included offense

State v. Jones, 329 S.E.2d 65 (1985) (McHugh, J.)

Appellant was convicted of arson in the first degree. He admits he started the fire in two cells of the county jail, but contends he never intended to burn the jail. Instead he asserts he merely desired to burn the personal property of a fellow inmate with whom he had a dispute. The circuit court instructed the jury they could return a verdict of guilty of arson in the first degree, guilty of arson in the fourth degree (attempt) or not guilty. On appeal, he contends the circuit court erred in not instructing the jury upon arson in the third degree as a lesser included offense.

The Court found in this State, the offenses of first, second and third degree arson are set forth in separate statutes, and the degree of arson is determined by the type of property involved. Except for the penalties to be imposed and the distinctions as to type of property involved, the arson statutes are identical. The Court concluded the appellant was correct in asserting that arson in the third degree is a lesser include offense of arson in the first degree.

Syl. pt. 2- Arson in the third degree, *W.Va. Code*, 61-3-3 [1957], is a lesser included offense of arson in the first degree, *W.Va. Code*, 61-3-1 [1935]; thus, where a criminal defendant, an inmate of a county jail, admitted at trial that he started a fire in his cell block, and the evidence at trial was in conflict as to whether he intended to burn the jail within the meaning of this State's arson in the first degree statute, *W.Va. Code,* 61-3-1 [1935], or intended to burn the personal property of a fellow inmate within the meaning of this State's arson in the third degree statute, *W.Va. Code* 61-3-3 [1957], the defendant, indicted for arson in the first degree, was entitled to an instruction upon arson in the third degree, as a lesser included offense under the indictment.

ASSAULT AND BATTERY

Self-defense

State v. Smith, 295 S.E.2d 820 (1982) (Harshbarger, J.)

See SELF-DEFENSE When defense may not be asserted, (p. 484) for discussion of topic.

ATTORNEYS

Disbarment

Committee on Legal Ethics v. Pence, 297 S.E.2d 843 (1982) (McGraw, J.)

"The general rule for reinstatement is that a disbarred attorney in order to regain admission to the practice of law bears the burden of showing that he presently possesses the integrity, moral character and legal competence to resume the practice of law. To overcome the adverse effect of the previous disbarment he must demonstrate a record of rehabilitation. In addition, the court must conclude that such a reinstatement will not have a justifiable and substantial adverse effect on the public confidence in the administration of justice and in this regard the seriousness of the conduct leading to disbarment is an important consideration." Syl. pt. 1, *In re Brown*, 273 S.E.2d 567 (W.Va. 1980).

"Rehabilitation is demonstrated by a course of conduct that enables the court to conclude there is little likelihood that after such rehabilitation is completed and the applicant is readmitted to the practice of law he will engage in unprofessional conduct." Syl. pt. 2, *In re Brown*, 273 S.E.2d 567 (W.Va. 1980).

"Absent a showing of some mistake of law or arbitrary assessment of the facts, recommendations made by the State Bar Ethics Committee in regard to reinstatement of an attorney are to be given substantial consideration." Syl. pt. 3, *In re Brown*, 273 S.E.2d 567 (W.Va. 1980).

"In a proceeding for reinstatement of an attorney's license after annulment general testimony that the petitioner either is or is not of good moral character is entitled to little weight." Syl. pt. 3, in part, *In re Smith*, 270 S.E.2d 768 (W.Va. 1980).

The Supreme Court denied the petition for reinstatement and ordered the petitioner to reimburse the Committee on Legal Ethics for the actual and necessary expenses reasonably incurred by it.

ATTORNEYS

Professional responsibility

Carter v. Taylor, 310 S.E.2d 213 (1983) (Per Curiam)

Appellant was convicted of criminal contempt. Appellant alleged that trial counsel should have objected to the testimony of the plaintiff's attorney's law partner, who identified two photos of the disputed property and related to the jury a conversation he had with the defendant. Although the Supreme Court did not condone the practice of an attorney testifying at a trial in which the attorney's law partner is representing one of the parties, *See* D.R. 5-102 of the Code of Professional Responsibility, the Court concluded that here, no prejudice was suffered by the defendant because the evidence of the conversation was relevant only to one count in the contempt citation that was subsequently dismissed.

Prosecutors

Conduct during trial

See DENIAL OF A FAIR TRIAL Prosecutor's comments/conduct for discussion of topic.

State v. Ashcraft, 309 S.E.2d 600 (1983) (McGraw, C.J.)

See DENIAL OF A FAIR TRIAL Use of exhibits not in evidence.

Duties

State ex rel. Koppers Co., Inc. v. International Union of Workers, 298 S.E.2d 827 (1982) (Harshbarger, J.)

See CONTEMPT Due process, Right to be prosecuted by a State's attorney, (p. 67) for discussion of topic.

ATTORNEYS

Prosecutors (continued)

Duties (continued)

State ex rel. Ginsberg v. Naum, 318 S.E.2d 454 (1984) (Harshbarger, J.)

Syl. pt. 1- When the legislature has declared particular activity to be criminal, a county prosecutor has a duty to enforce that law.

Syl. pt. 2- A county prosecutor cannot avoid prosecuting criminals because he does not have enough personnel to deal with his caseload. His recourse is to have his county commission, whose responsibility it is to provide him staff sufficient to his needs.

Special/private

State ex rel. Johnson v. Robinson, 251 S.E.2d 505 (1979) (McGraw, J.)

Syl. pt.- Under *W.Va. Code* § 7-7-8 [1972], a county commission is vested with the authority and discretion to determine what constitutes a reasonable amount of compensation for the performance of legal services by a special prosecuting attorney appointed thereunder.

The Supreme Court found the circuit court has discretion in the matter of appointing more than one special prosecutor per case. If the circuit court, in considering all of the circumstances, determines that the complexity of the case requires multiple prosecutors, such discretion is exercised within reasonable limits is not to be interfered with.

Yet, in exercising its discretion to appoint more than one special prosecutor, the trial court must act reasonably and be mindful of the defendant's due process right to fair trial.

The Supreme Court suggests some guidelines regarding the proper general procedure to be followed under *W.Va Code* 7-7-8. See case for discussion. The Court also notes that the statute contains nothing which precludes the county commission and a prospective special prosecutor from discussing the matter of fees prior to the prosecutor's appointment.

ATTORNEYS

Prosecutors (continued)

Special/private (continued)

State ex rel. Koppers Co., Inc. v. International Union of Workers, 298 S.E.2d 827 (1982) (Harshbarger, J.)

See CONTEMPT Due process, Right to be prosecuted by a State's attorney, (p. 67) for discussion of topic.

Reprimands

In re L.E.C., 301 S.E.2d 627 (1983) (Harshbarger, J.)

The Committee on Legal Ethics has broad jurisdiction to conduct legal ethics investigations and is authorized to hold hearings to make findings and recommendations. Art. VI, § 4, By-Laws of the West Virginia State Bar.

When the Committee on Legal Ethics makes public reprimand, or suspension or annulment of an attorney's license it must sue in the Supreme Court to impose those sanctions. Though the Committee's recommendations are given substantial consideration, the Supreme Court is the final arbiter. However, the Committee administers sanctions for private reprimand without Supreme Court involvement.

The bar by-laws are silent about whether an attorney may petition the Supreme Court to review the Committee on Legal Ethics' decision to reprimand him.

Syl. pt. 1- An attorney who is privately reprimanded by the Committee on Legal Ethics of the West Virginia State Bar has a personal and professional interest justifying a petition to this Court for an appeal challenging his reprimand.

The Supreme Court adopts the rule permitting review of private reprimands under its inherent power to supervise, regulate and control the practice of law and its authority to prescribe procedures for disciplining, suspending and disbarring attorneys at law. *W.Va. Code* 51-1-4a(c).

ATTORNEYS

Reprimands (continued)

In re L.E.C., (continued)

Respondent/attorney was retained as counsel when his client was charged with murder. A retainer fee and installment plan were agreed upon; however, no payment was forthcoming. Subsequently, respondent was appointed as counsel for the indigent client. After his appointment, respondent accepted $500 cash from client and then submitted a verified defense counsel voucher for $1500 (*W.Va. Code* 29-21-14) for services rendered and expenses incurred. He received the entire $1500 and did not disclose the fact the he had already received $500. Respondent was privately reprimanded by the Committee on Legal Ethics. The Committee concluded that respondent owes a duty of "utmost frankness" to client's family. The Supreme Court agreed.

Syl. pt. 3- If an attorney receives any compensation from a private source for services rendered or expenses incurred representing an indigent criminal defendant who he has been appointed to represent pursuant to *W.Va. Code*, 62-3-1, he shall disclose this fact to the trial court. The disclosure must be made at the time he submits a Defense Counsel Voucher seeking compensation from public funds as provided for by *W.Va. Code*, 29-21-14.

The Committee further concluded that the statutory fee paid to the attorney constituted his exclusive compensation and he had no right to receive additional compensation from his client or his family without disclosing that fact to the court which appointed him.

Syl. pt. 2- An attorney who has been appointed to represent an indigent criminal defendant may not solicit or contract for an additional fee for his professional services with the indigent criminal defendant or any other person. The pay provided by statute, *W.Va. Code*, 29-21-14 [1981], for his actual and necessary services and expenses, is his exclusive compensation.

Attorney, privately reprimanded for nondisclosure of fees received after his appointment, contended that the fees represented payment for services rendered and expenses incurred before appointment. The court held:

ATTORNEYS

Reprimands (continued)

In re L.E.C., (continued)

Syl. pt. 4- An attorney who is initially retained but later appointed to represent an indigent criminal defendant, is not limited exclusively to the compensation provided by statute, *W.Va. Code*, 29-21-14, if he can demonstrate to the trial court that he has received compensation for professional services performed or expenses incurred before his appointment. He can retain those funds and be compensated per *W.Va. Code*, 29-21-14, as is he had not been previously retained.

The Court did not reach the question of whether $500 was for services and expenses prior to appointment because the Committee's reprimand was based entirely upon the nondisclosure of payment.

BAIL

Post-conviction

Pending appeal

State v. Steele, 314 S.E.2d 413 (1984) (Miller, J.)

The petitioner was convicted of first degree murder with mercy, and third degree arson. The jury also found the murder was committed with use of a firearm. The petitioner filed a petition for bail in the Supreme Court after the circuit court ruled it lacked jurisdiction under Code 62-1C-1 (1983) to grant post-conviction bail. The Supreme Court took this opportunity to clarify the procedure that a circuit court must follow when it concludes that under Code 62-1C-1 (1983) a defendant is not entitled to post-conviction bail.

Syl. pt. 1- The legislature amended *W.Va. Code*, 62-1C-1(b) (1983), to provide that the circuit court must deny post-conviction bail pending the appeal of a conviction for an offense which was committed with the use or attempted use of a firearm or other deadly weapon or by the use of violence to the person. The amendment does not permit this Court to review such denial of bail upon a summary petition.

Syl. pt. 2- Although *W.Va. Code*, 62-1C-1(b) (1983), prohibits a circuit court from granting post-conviction bail in certain circumstances, we do not construe the statute as preventing the circuit court from developing a bail record.

Syl. pt. 3- "Where bail is sought and opposed by the State, either as to the right to bail or the amount, the trial court must provide a hearing and a written statement of reasons for its decision.." Syllabus, *State v. Gary*, 162 W.Va. 136, 247 S.E.2d 420 (1978).

The Court found the development of a bail hearing record is essential so the Supreme Court can perform a meaningful review under Code 62-1C-1 (1983).

Syl. pt. 4- Although *W.Va. Code*, 62-1C-1(b) (1983), provides that this Court may grant post-conviction bail "where there is a likelihood that the defendant will prevail upon the appeal," we do not interpret this provision to be the sole criterion for granting bail after conviction.

BAIL

Post-conviction (continued)

Pending appeal (continued)

State v. Steele, (continued)

The Court noted that customarily, when an application for bail is made to the Supreme Court, the State is accorded the right to respond in order that it may present its position.

The Court noted that frequently, there will be material disputes of fact and it is difficult for them to resolve these disputes based purely on the pleadings filed in the Supreme Court. The Court noted that the trial court is in a better position to resolve these disputes and can, if necessary hold an evidentiary hearing.

The Court also noted the amendment provides for bail where there is a likelihood the defendant will prevail on appeal. The Court noted the defendant's claim of error made in the bail petition will parallel the grounds of error asserted before the trial court, and that if a bail record is first made at the circuit court level, the Supreme Court will have the benefit of the court's comments with regard to the assigned error.

The Court found that although Code 62-1C-1(b) (1983) provides they may grant post-conviction bail where there is a likelihood the defendant will prevail on appeal, that is not the sole criterion for granting bail after conviction.

Syl. pt. 5- The pendency of other charges against the defendant, the amount of the individual's pretrial bond, the regularity of his preconviction appearances, the severity of the sentence imposed, and the likelihood of meritorious grounds for an appeal are all relevant factors to weigh in regard to post-conviction bail. Also pertinent are the defendant's community ties, his age, and his health.

The Court noted they explained in *State ex rel. Bennett v. White*, 258 S.E.2d 123 (W.Va. 1979). Why post-conviction bail is less liberally accorded than at the pretrial stage.

BAIL

Post-conviction (continued)

Pending appeal (continued)

State v. Steele, (continued)

Syl. pt. 6- "A case by case determination of the right to and amount of bail in criminal proceedings is consistent with the Bill of Rights provision that excessive bail shall not be required and with the discretion vested in the courts under provisions of *W.Va. Code*, 62-1C-1." Syllabus point 1, *State ex rel. Hutzler v. Dostert*, 160 W.Va. 412, 236 S.E.2d 336 (1977).

The Court found because these additional factors need to be considered there is still the need to have a record developed at the circuit court level applying this bail criteria.

In this case, the Court found the defendants allegations in her bail petition were not sufficient to provide a history of her background which bears on the question of her likelihood not to flee, and there was nothing to indicate her ability to meet a higher bond if one should be set. The Court also found they were unable to make any determination on the merits of the alleged errors because the defendant's grounds and the State's response was given in a conclusionary fashion and the arguments were not fully developed. The Court remanded the case for further development.

Revocation

Right to hearing

Marshall v. Casey, 324 S.E.2d 346 (1984) (McHugh, C.J.)

Petitioner seeks relief from revocation of bail. Petitioner was released on bail following his arrest for sexual assault and burglary. During his release, petitioner was arrested for trespassing. On the day of his arrest, the State presented a written motion to revoke bail on the felony charges. The circuit court granted the motion to revoke bail. The parties agree the order of the court was based on an unverified motion by the prosecutor with no supporting exhibits. The court order found "good cause" for bail revocation and set a hearing on the matter. The hearing was never held. The respondent

BAIL

Revocation (continued)

Right to hearing (continued)

Marshall v. Casey, (continued)

contends petitioner's counsel could not attend the hearing and failed to reschedule.

Syl. pt. 1- "Where bail is sought and opposed by the State, either as to the right to bail or the amount, the trial court must provide a hearing and a written statement of the reasons for its decision." Syl., *State v. Gary*, 162 W.Va. 136, 247 S.E.2d 420 (1987).

Syl. pt. 2- An accused admitted to bail pursuant to *W.Va. Code*, 62-1C-1 [1983], *et seq*., whose bail is subsequently revoked, upon credible evidence reflected in a sworn affidavit by the prosecuting attorney, a law enforcement officer, surety or other appropriate person, for alleged violations of law or conditions of the bail, may, by motion, challenge the revocation of bail and seek readmission to bail and upon that motion, the accused shall be entitled to a hearing. The hearing concerning the revocation of bail and requested admission to bail shall be governed by subdivision (h) of Rule 46 of the West Virginia Rules of Criminal procedure, which subdivision provides for "Bail Determination Hearings" in certain bail matters.

The Supreme Court found the petitioner is not entitled to relief since the hearing was not conducted due to scheduling problems of petitioner's counsel and since counsel failed to pursue the matter in circuit court.

BREAKING AND ENTERING

Aiding and abetting

Sufficiency of evidence

State v. Tadder, 313 S.E.2d 667 (1984) (McHugh, C.J.)

Appellant was convicted of aiding and abetting the breaking and entering of a grocery store.

Officers responded to an anonymous call that glass was heard breaking at a grocery store. Upon arriving they noticed two men in the store. The two were placed in custody. A few minutes later, the officers noticed a truck pulling out of a parking lot near the store. The brother of one of the men apprehended in the store was driving the truck. The appellant was in the passenger seat of the truck. The officers stopped the truck, conducted a warrantless search of the vehicle and located in the glove compartment the wallets of the two men apprehended in the store. The driver of the truck and the appellant were taken into custody.

The appellant alleged the link between the breaking and entering of the grocery store and the appellant's presence at the scene as a passenger in the truck was too weak to incriminate the appellant in the crime.

The Supreme Court found the record demonstrates the appellant was in the vicinity of the store at the time of the breaking and entering, that appellant was in the truck with the brother of one of the men apprehended in the store, and that the truck had been in the lot near the store shortly prior to the stopping of the truck by police. The Supreme Court concluded there was sufficient evidence to support the conviction.

Dwelling

State v. Jacobs, 298 S.E.2d 836 (1982) (Per Curiam)

Appellant was convicted of entering without breaking with intent to commit larceny of an antique pump organ. On appeal, he argued that the trial court erred when it failed to submit to the jury the issue of whether the building from which the pump organ was removed was a "storehouse" within the meaning of *W.Va. Code* § 61-3-12 (1977 Replacement Vol.). Apparently the appellant contended that the house was an abandoned building and therefore

BREAKING AND ENTERING

Dwelling (continued)

State v. Jacobs, (continued)

not within the purview of the statute. The Supreme Court found this contention to be without merit. The Court found the issue of whether the building was a "storehouse" was submitted to the jury.

Ownership of the property

State v. Jacobs, 298 S.E.2d 836 (1982) (Per Curiam)

The appellant argued that error was committed below because the State failed to prove who owned the pump organ. The Supreme Court found this argument was without merit. They found that ownership of property mentioned in the indictment for the offense proscribed by *W.Va. Code* § 61-3-12 may properly be laid in one having possession of the property.

Sufficiency of evidence

State v. Tadder, 313 S.E.2d 667 (1984) (McHugh, C.J.)

See BREAKING AND ENTERING Aiding and abetting, Sufficiency of evidence, (p. 50) for discussion of topic.

Value of stolen property

State v. Jacobs, 298 S.E.2d 836 (1982) (Per Curiam)

The appellant argued that error was committed below because the State failed to produce competent evidence of the value of a stolen pump organ. The Supreme Court found that in the prosecution under *W.Va. Code* 61-3-12 the value of the property is not a critical determination, since the statute proscribes without breaking "with intent to commit a felony *or any larceny*. . ." (emphasis added). A witness who possessed an undivided organ was $1,000. The Supreme Court found the owner testimony is generally competent to establish the value of stolen property.

BURDEN OF PROOF

Elements of the offense

State v. Hodges, 305 S.E.2d 278 (1983) (McHugh, J.)

The absence of a license is an element of the crime of carrying a dangerous or deadly weapon without a license. Under the rule enunciated in *Pendry*, the burden of proof as to this element must be borne by the State. The burden may not be shifted to the defendant to negative an element of the offense with which he is charged.

CLOSING STATEMENTS

In general

State v. Flint, 301 S.E.2d 765 (1983) (McHugh, J.)

See DENIAL OF A FAIR TRIAL Prosecutor's comments/conduct, (p. 98) for discussion of topic.

COMPETENCY

Confidentiality of medical records

State v. Cheshire, 313 S.E.2d 61 (1984) (Per Curiam)

In appellant's first appeal, the Supreme Court remanded, finding the trial court did not conduct a proper competency hearing and make adequate findings of fact as to the defendant's competency to plead guilty. On remand the trial court conducted further hearings, made detailed findings, and found from a preponderance that the defendant was competent to enter the guilty pleas. The trial court denied her motion to vacate the pleas and sentenced her.

In this appeal, the appellant contends the testimony of Dr. Williams was improperly admitted in evidence, in violation of the physician - patient privilege, because the doctor was contacted by the defense on a private basis to perform a further evaluation after the Supreme Court remanded the case for a proper competency hearing.

The Supreme Court found that aside from the issues of whether such privilege exists in a criminal case in this State and whether the defendant could rely on it having out her competency in issue, they questioned whether the consultation was performed on a private basis. The consultation fee was paid by W.Va. Public Legal Services and Dr. Williams' report indicated the defendant was referred by her attorney for a psychological re-evaluation to determine her competency to enter pleas of guilty to the forgery charges. An order of the trial court indicated the parties stipulated to the contents of the doctor's written psychological evaluation and that the information contained therein could be considered by the trial court in making its determination of whether defendant was mentally competent to plead guilty and waive her *Miranda* rights.

The Supreme Court found in view of this stipulation, they found no basis for any complaint about the admission of the doctor's testimony. They also found the information obtained during a court-ordered examination to determine competency pursuant to Code 27-6A-1 can be disclosed. See *State v. Simmons*, 309 S.E.2d 89 (W.Va. 1983).

COMPETENCY

Criminal responsibility

See INSANITY, (p. 284) for discussion of topic.

State v. Flint, 301 S.E.2d 765 (1983) (McHugh, J.)

See INSANITY Right to psychiatric evaluation, (p. 290) for discussion of topic.

Right to counsel

State v. Jackson, 298 S.E.2d 866 (1982) (Harshbarger, J.)

See SELF-INCRIMINATION - STATEMENTS BY DEFENDANT Statements to court-appointed psychiatrists, (p. 490) for discussion of topic.

Right to remain silent

State v. Jackson, 298 S.E.2d 866 (1982) (Harshbarger, J.)

See SELF-INCRIMINATION - STATEMENTS BY DEFENDANT Statements to court-appointed psychiatrists, (p. 490) for discussion of topic.

To enter guilty plea

State v. Cheshire, 313 S.E.2d 61 (1984) (Per Curiam)

See COMPETENCY To stand trial, (p. 58) for discussion of topic.

COMPETENCY

To stand trial

State v. Dye, 298 S.E.2d 898 (1982) (Per Curiam)

The defendant contended that the trial court erred in denying his motion for a hearing on reports of physicians who examined him at the trial judge's order to determine whether he was addicted to drugs. In conjunction with this contention, the defendant argued that he was entitled to a psychiatric evaluation under *W.Va. Code* 27-6A-1 [1977]. The trial court indicated that his observations of the defendant together with various *pro se* motions and letters filed in this case led him to conclude that there was no doubt as to the defendant's competence to stand trial. The Supreme Court could not say that the trial court abused its discretion in so ruling.

The report filed with the trial court the day trial began addressed itself to the defendant's physical condition. The defendant claims that the denial of his request for a hearing on the report violated his absolute right to a hearing under *W.Va. Code* 27-6A-1(d) [1977]. The Supreme Court found that the report filed was not a psychiatric report and was not ordered under the court's 27-6A-1(a) authority. Therefore, the right to a hearing provided in 27-6A-1(d) was inapplicable, and the motion was properly denied.

State v. Williams, 301 S.E.2d 187 (1983) (Neely, J.)

The appellant alleged that the trial court erred in finding him competent to stand trial. The Supreme Court found they were not absolutely convinced of the appellant's competency, neither were they convinced that the trial court's findings of fact on this matter, supported by the testimony of both state psychiatrists, was "clearly wrong."

State v. Audia, 301 S.E.2d 199 (1983) (McHugh, J.)

The appellant alleged that the trial court erred in denying his motion under *W.Va Code* 27-6A-1(d) (1977) for a evidentiary hearing on the issue of his competency. The appellant's chief defense was that he was so intoxicated by drugs or alcohol at the time of the robbery that he was unable to perform the specific intent to commit the crime, and was so diminished in his physical

To stand trial (continued)

State v. Audia, (continued)

and mental capacity that he was more susceptible to coercion by his co indictee. Appellant filed a motion seeking treatment and observation to determine whether he was competent to stand trial and whether he could be held criminally responsible for the crime charged.

The trial court considered these reports and found that appellant was competent at the time of the offense, and was mentally competent to stand trial, and reaffirmed this finding after a third psychiatric report was completed. Prior to the impaneling of a jury, appellant presented a motion for an evidentiary hearing in accordance with *W.Va. Code* 27-6A-1(d). The trial court denied the motion, stating that it had never found the slightest indication that appellant was in any way incompetent, and found the motion was not timely.

The Supreme Court found that under Code 27-6A-1(a) [1977] a trial court has no obligation to order mental examinations where there is no initial showing that a defendant is incompetent. Here, the trial court did so merely as a precaution. The Supreme Court found no evidence which would indicate that the appellant was not competent to stand trial, and it would have been pointless to have held a hearing. The Supreme Court also held the trial court was correct in ruling that the motion was not timely since the final report and the judge's reaffirmation of his previous ruling were filed ten days before the trial.

The Supreme Court also noted that it appeared that the appellant's main purpose in requesting a hearing was to obtain evidence of his mental condition at the time of the offense, and that *W.Va. Code* 27-6A-1 [1977] does not require a pre-trial hearing on the issue of criminal responsibility.

State v. Simmons, 309 S.E.2d 89 (1983) (Miller, J.)

See INSANITY Confidentiality of medical records, (p. 284); INSANITY Physician-patient privilege, (p. 287) for discussion of topic.

COMPETENCY

To stand trial (continued)

State v. Cheshire, 313 S.E.2d 61 (1984) (Per Curiam)

In appellant's first appeal, the Supreme Court remanded, finding the trial court did not conduct a proper competency hearing and make adequate findings of fact as to the defendant's competency to plead guilty. On remand the trial court found from a preponderance that the defendant was competent to enter the guilty pleas. The trial court denied her motion to vacate the guilty pleas, denied probation, and sentenced her.

In this appeal, the appellant alleges the trial court's finding that she was competent to enter the guilty pleas on two counts of forgery was not supported by the evidence.

Applies standard set forth in Syl. pt. 2, *State v. Arnold*, 219 S.E.2d 922 (W.Va. 1975), overruled on other grounds, *State v. Demastus*, 276 S.E.2d 443 (W.Va. 1976). See *State ex rel. Williams v. Narick*, 264 S.E.2d 851 (W.Va. 1980). (Found in Vol. I under this topic.)

"Evidence of irrational behavior, a history of mental illness or behavioral abnormalities, previous confinement for mental disturbance, demeanor before the trial judge, psychiatric and lay testimony bearing on the issue of competency, and documented proof of mental disturbance are all factors in which a trial judge may consider in the proper exercise of his discretion." Syl. pt. 5, *State v. Arnold*, 219 S.E.2d 922 (W.Va. 1975), overruled on other grounds, *State v. Demastus*, 276 S.E.2d 443 (W.Va. 1976).

The Supreme Court noted the trial court considered these factors and found no evidence of any irrational behavior other than the commission of these crimes, and found no evidence of mental illness. The Supreme Court noted the mental health experts agreed that the defendant was not mentally ill, but mentally retarded. There was no record of confinement for mental illness. The Supreme Court noted that during both guilty plea hearings, she responded appropriately to the Courts questions and sometimes consulted with her attorney. The trial court found her to be alert, and found that when the first guilty pleas was taken there was nothing to even suggest the defendant was incompetent.

COMPETENCY

To stand trial (continued)

State v. Cheshire, (continued)

The Supreme Court found the psychiatric evidence to be confusing, troubling, and abundant. Two experts reached the conclusion the defendant was competent to stand trial, but because of mental retardation it was doubtful she could assist counsel in her defense. The Court found that in view of the fact that the experts agreed on the absence of mental illness, the evidence bearing the degree of retardation was important. I.Q. test results of 59.68 and 74 were reported.

The Supreme Court found the defendant had fair to good recall of the facts surrounding the offenses and that the capacity to recall events is important in determining whether a criminal defendant has the mental ability to assist counsel in presenting a defense. The Court noted a defendant does not have to be a great witness to be competent to stand trial.

The Supreme Court concluded the trial court did not err in independently determining the defendant was competent, that the evidence preponderates in favor of competency and that the trial court's findings were not clearly wrong. The Court agreed with the trial court that the defendant's mental retardation was not so severe as to preclude her from consulting with her attorney with a reasonable degree of rational and factual understanding of the nature of the proceedings against her. They found she had a fair capacity to recall events, was not so impaired that she did not understand court procedures, could communicate on a simplistic level and would give accurate answers.

See COMPETENCY Confidentiality of medical records, (p. 54) for discussion of topics.

State v. Watson, 318 S.E.2d 603 (1984) (Miller, J.)

The appellant was convicted of breaking and entering. While awaiting trial, he allegedly attempted suicide on three occasions. Because of this, defense counsel moved for a pre-trial mental examination to determine appellant's competency to stand trial. After an untranscribed hearing was held. The trial judge denied the motion.

COMPETENCY

To stand trial (continued)

State v. Watson, (continued)

Syl. pt.2- Genuine attempts at suicide constitutes evidence of irrational behavior. When these acts are brought to the attention of a trial judge, he should order a psychiatric examination.

The Supreme Court found the trial judge abused its discretion in this case in failing to order a psychiatric examination.

State v. Schofield, 331 S.E.2d 829 (1985) (Neely, C. J.)

Appellant contends the trial court failed to properly determine the question of appellant's competency to stand trial under all the facts and circumstances of this case, erred in not holding a competency hearing under Code 27-6A-1(d) and erred in failing to request a neurological examination.

Before trial, defense counsel stated they were unable to communicate effectively with their client, and insisted their client misunderstood their advise and directions and persistently rambled and refused to discuss matters necessary to enable them to adequately represent her. The trial judge ordered the appellant to be examined by experts to ascertain if she was competent to stand trial. The initial examiners found her IQ to be below average, but denied that she was mentally ill or even deficient. As result of this first set of examinations, the trial court found appellant to be competent and notified defense counsel that they could request a hearing on the examiners findings under Code 27-6A-2 (1979). Defense counsel never asked for a hearing.

A plea bargain hearing was undertaken. Appellant was unwilling to plead guilty to second degree murder since, if the case went to trial, the jury could still return a verdict of manslaughter. At this point the defense attorneys filed affidavits outlining their difficulties in representing the appellant. The trial judge then acquiesced to a second series of competency examinations. The Court found the examiners did not find appellant to be incompetent, or mentally unable to discern the truth and that it appeared that she was only unwilling to reveal the truth.

COMPETENCY

To stand trial (continued)

State v. Schofield, (continued)

The Court found appellant would have been entitled to a neurological consultation had her attorney ever requested one. Here, counsel never requested a neurological examination, nor did counsel request a competency hearing under Code 27-6A-2 (1979). The Court found that since no such requests were made the trial court properly entered orders that found appellant competent to stand trial. Both orders noted that counsel could request, within reasonable time, an evidentiary hearing on the issue of competency. Counsel failed to request the heating. Instead, at the opening of the trial, counsel asked for the jury to make a competency determination. When asked why no request for a hearing had come earlier, counsel responded they preferred to allow the jury to determine the issue.

The court replied the matter was for the court and not the jury to decide and refused to bring the matter to the jury. Counsel demurred and stated they were ready to proceed.

The Court found in such circumstances it cannot be said the trial court denied appellant the opportunity for a judicial hearing on her competency to stand trial. The Court found a request made the day of the trial is *prima facie* untimely.

Syl. pt.3- A request for a pretrial competency hearing under *W.Va. Code* 27-6A-2 [1979] that was made on the first time on the date of the trial's commencement was properly denied because previous medical and psychiatric examinations were unanimous in affirming the defendant's competency to stand trial.

CONSPIRACY

Constitutionality of statute

State v. Less, 294 S.E.2d 62 (1981) (McHugh, J.)

Syl. pt. 3- The terms of *W.Va. Code*, 61-10-31(1), are clear and unambiguous on their face and of are sufficient definiteness to give a person of ordinary intelligence fair notice that agreeing to commit to an act made a felony or misdemeanor by the law of this state is prohibited.

Elements of the offense

State v. Less, 294 S.E.2d 62 (1981) (McHugh, J.)

Syl. pt. 1- *W.Va. Code*, 61-10-31(1), is a general conspiracy statute and the agreement to commit any act which is made a felony or a misdemeanor by the law of this state is a conspiracy to commit an "offense against the State" as the term is used in the statute.

Syl pt. 4- In order for the State to prove a conspiracy under *W.Va. Code*, 61-10-31(1), it must show that the defendant agreed with others to commit an offense against the State and that some overt act was taken by a member of the conspiracy to effect the object of that conspiracy.

W.Va. Code, 61-10-31(1) does not require proof of an agreement to conspire to commit an offense.

Under 61-10-31(1) the State must prove an agreement to commit an "offense against the State."

The substantive crime which is the object of the conspiracy can be proven as the overt act.

The agreement to commit an offense is the essential element of the crime of conspiracy- it is the conduct prohibited by the statute.

Agreement to conspire may be inferred from the words and actions of the conspirators, or other circumstantial evidence, and the State is not required to show the formalities of an agreement.

CONSPIRACY

Elements of the offense (continued)

State v. Less, (continued)

Where one member of a group suggested a robbery and other members accompanied her both to her home for a clothes change and the actual robbery, there was sufficient evidence to support the State's finding of the existence of a conspiracy and the commission of one or more overt acts in furtherance of the conspiracy.

Though appellant remained in the car during the actual robbery he was present at all stages of the planning, preparation, and execution. He discussed the robbery and the amount taken, he assisted the group in fleeing, and he spent the money. All this was evidence upon which the jury could have concluded that appellant had agreed to the commission of the offense.

The purpose of the overt act required within *W.Va Code*, 61-10-31(1), is merely to show "that the conspiracy is at work."

It is not necessary that each conspirator commit an overt act; an overt act triggering conspiracy can be committed by any one of the conspirators.

W.Va. Code, 61-10-31, provides that it shall be unlawful for two or more persons to conspire (1) to commit any offense against the State. . . . Robbery is a common law felony for which punishment is provided by *W.Va. Code* 61-2-12.

Agreement to commit robbery is, therefore, a conspiracy to commit an offense against state within the meaning of *W.Va. Code* 61-10-31(1). Appellant was properly charged with conspiracy to commit robbery.

CONTEMPT

Civil-criminal distinction

State ex rel. Koppers Co., Inc. v. International Union of Workers, 298 S.E.2d 827 (1982) (Harshbarger, J.)

A criminal contempt, as opposed to a civil contempt, is prosecuted to vindicate the authority and dignity of a court. When a criminal contempt is not committed in a court's presence, it is an indirect (or constructive) contempt. The court is informed of the alleged affront by affidavit and petition for attachment or order to show cause. Issuance of an attachment initiates a separate and distinct criminal proceeding, different from the civil suit that spawned the contempt. A criminal contempt should be brought in the name of the State.

In re Yoho, 301 S.E.2d 581 (1983) (Harshbarger, J.)

There are four kinds of contempt: direct -criminal, indirect-criminal, direct-civil, and indirect-civil. *State ex rel. Robinson v. Michael*, 276 S.E.2d 812, 817 (W.Va. 1981), footnote 9.

A direct contempt is one committed in the actual presence of the court. *State ex rel. Koppers Co., Inc. v. International Union of Oil, Chemical, and Atomic Workers*, 298 S.E.2d 827, 829 (W.Va. 1982). An indirect, or constructive, contempt is not viewed by the court and requires a party to come before the court with sworn testimony attesting to its existence. It can only be established by extrinsic evidence, must be instituted by information or citation or rule to show cause and the condemner is entitled to a hearing. *Scoot v. Dinges*, 236 S.E.2d 468 (W.Va. 1977), footnote 2.

Syl. pt. 2- An unjustified refusal to testify with immunity before a grand jury, after being ordered by a court to do so, and a face-to-face reiteration to that court of the refusal, is a direct contempt.

Syl. pt. 3- An unjustified refusal to testify before a grand jury may be either a civil or criminal contempt or both.

Applies syl. Pts. 1, 2, and 3, *State ex rel. Robinson v. Michael*. (Found in Vol. I under this topic.)

CONTEMPT

Civil-criminal distinction (continued)

In re Yoho, (continued)

In West Virginia criminal concepts are governed by both W.Va. Rules of Criminal Procedure, Rule 42 and Code, 61-5-26, and civil concepts by *W.Va. Code* 57-5-6.

Under the guidelines set forth in *State ex rel. Robinson v. Michael*, *supra*, where defendant was ordered incarcerated until he testified and could purge himself of the contempt to avoid incarceration, he was being coerced, not punished. His contempt, therefore, was civil.

Footnote 11- The U.S. Supreme Court has recommended that civil sanctions to coerce testimony, if feasible, be attempted prior to resorting to criminal ones. *Chelation v. United States*, 384 U.S. 364, 371, n. 9, 86 S. Ct. 1531, 16 L.E.2d 622 (1966).

Direct/indirect

In re Yoho, 301 S.E.2d 581 (1983) (Harshbarger, J.)

See CONTEMPT Civil-criminal distinction, (p. 64) for discussion of topic.

Due process

State ex rel. Koppers Co., Inc. v. International Union of Workers, 298 S.E.2d 827 (1982) (Harshbarger, J.)

Indirect criminal condemners are entitled to the same rights as other criminal defendants, e.g., the presumption of innocence, proof beyond a reasonable doubt, criminal rules of evidence, right to counsel, full and plain information about the character and cause of the accusation, and admission to bail. Also, condemners are entitled to be prosecuted by a State's attorney as are other criminal defendants. It is a standard criminal procedure involving the government's attempt to punish violators of its laws.

Due process (continued)

In re Yoho, 301 S.E.2d 581 (1983) (Harshbarger, J.)

The due process standards for direct civil concepts are stated in *Chesapeake and Ohio System Federation, Brotherhood of Maintenance of Way Employees v. Hash*, 294 S.E.2d 96, 101 (W.Va. 1982):

[An] alleged condemner is subject to incarceration or fine if he is found guilty of the contempt and is therefore entitled to certain fundamental procedural safeguards to insure that he is not deprived of his liberty or property without due process of law. The most basic of the procedural safeguards guaranteed by the due process provisions of our state and federal constitutions are *notice* and the *opportunity to be heard*, which are essential to the jurisdiction of the court in any pending proceeding. *State ex rel. Scaley v. Hereford*, 131 W.Va. 84, 45 S.E.2d 738 (1947). (Emphasis supplied).

Defendant was informed prior to his refusal to testify and again after it that his actions were contemptuous. Furthermore, defendant was present with his counsel, he had an opportunity to be heard, and a stenographic record was prepared. Moreover, the trial court's decision was based upon competent evidence actions committed in his presence and defendant's testimony. Those procedures adequately protected defendant's due process rights.

See CONTEMPT Refusal to testify before grand jury, (p. 68) for discussion of topic.

In a civil contempt proceeding based upon defendant's refusal to testify with immunity before a grand jury, counsel's failure to request a delay to hold a plenary hearing was fatal to his appellant argument.

Carter v. Taylor, 310 S.E.2d 213 (1983) (Per Curiam)

Appellant claimed that objection should have been made to Mr. Taylor's (a party to the original suit) attorney prosecuting the contempt proceeding in the light of *State ex rel. Koppers Co., Inc. v. International Union of Oil, Chemical and Atomic Workers*, 298 S.E.2d 827 (W.Va. 1982). The Supreme Court found *Koppers* was issued several months after the completion of the trial in this case and thus trial counsel could not be charged with knowledge of it.

Due process (continued)

Carter v. Taylor, (continued)

See ATTORNEYS Professional responsibility, (p. 41) for discussion of topic.

Right to be prosecuted by a State's attorney

State ex rel. Koppers Co., Inc. v. International Union of Workers, 298 S.E.2d 827 (1982) (Harshbarger, J.)

A public prosecutor's fundamental duty is to do justice; his other presence should protect against overzealousness and an unrestrained pursuit of private vindication. Participation by a private prosecutor does not obviate the need for a public prosecutor's presence, he being ultimately responsible for discretion regarding prosecution of alleged public law offenders.

Although a private prosecutor is held to the same high standards as a public one, the apparent conflict of interest and pressure of "wearing two hats" militates against permitting a party's private counsel to prosecute a criminal contempt charge stemming from a civil suit; and it makes no difference whether he acts as private lawyer or by appointment as special prosecutor. A trial judge may use his discretion about whether to permit a party's counsel to act as a private prosecutor to assist the government prosecutor. "The role of a private prosecutor does not imply that he should be favored for selection as special prosecutor where the regular prosecutor is disqualified and *W.Va. Code*, 7-7-8." *State v. Adkins*, 261 S.E.2d 55 (W.Va. 1979), *cert. denied*, 445 U.S. 904, 100 S.C. 1081 (1980).

The alleged criminal condemners were denied due process of law when their criminal concepts were prosecuted by Kipper's lawyers.

CONTEMPT

Recusal of trial judge

Carter v. Taylor, 310 S.E.2d 213 (1983) (Per Curiam)

Appellant was convicted of criminal contempt. He alleges his trial counsel should have moved that the trial court be recused from hearing the case under that portion of Rule 42(b) of the West Virginia Rules of Criminal Procedure which provides: If the contempt charge involves disrespect to of criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent."

The Supreme Court found that this language is taken from Rule 42(b) of the Federal Rules of Criminal Procedures and has been taken to mean that the contempt must involve some direct or personal attack on the judge and his rulings. The Court noted the placement of this language in 42(b) ordinarily excludes is operation from 42(b) dealing with summary contempt procedures. (Cites omitted). The Court concluded here there was no direct or personal attack on the judge committed in his presence and therefore the Rule 42(b) language is not applicable.

Refusal to testify before grand jury

In re Yoho, 301 S.E.2d 581 (1983) (Harshbarger, J.)

Syl. pt. 1- Fear of harm to one's safety cannot justify a refusal to testify before a grand jury.

Syl. pt. 2- An unjustified refusal to testify with immunity before a grand jury, after being ordered by a court to do so, and a face-to-face reiteration to that court of the refusal, is a direct contempt.

Syl. pt. 3- An unjustified refusal to testify before a grand jury may be either a civil or criminal contempt or both.

Syl. pt. 4- A summary civil contempt proceeding for refusal to testify before a grand jury after receiving immunity and being ordered to do so does not violate due process. Defendant must be informed about the contempt, is entitled to be present with counsel and be heard, a stenographic record should be made, and the court must base its decision on competent evidence.

Refusal to testify before a grand jury (continued)

In re Yoho, (continued)

Syl. pt. 5- A civil contempt sentence for a grand jury witness' refusal to testify must cease when the witness purges himself by testifying or at the end of the grand jury's term.

After defendant has been granted immunity, his refusal to testify before a grand jury constituted contempt of court. Fear of harm was no justification.

W.Va Code, 57-5-6, must be understood to limit the period of confinement for those civil concepts until the end of trial or grand jury term.

A civil contempt sentence for a grand jury witness' refusal to testify must cease when the witness purges himself by testifying or at the end of the grand jury's term. *Shilllitani v. U.S.*, *supra*.

Carter v. Taylor, 310 S.E.2d 213 (1983) (Per Curiam)

Appellant contended trial counsel should have objected to the insufficient specificity of the contempt charges. The Supreme Court found an examination of the charges disclosed that the various incidents were substantially identified.

CONTINUANCE

Absence of material witness

State v. Mays, 307 S.E.2d 655 (1983) (Neely, J.)

Appellant alleged the trial court abused its discretion in failing to grant a motion for continuance so the appellant could attempt to find a material witness. The original trial date was set for April 7, 1981. Counsel for appellant requested and received three continuances until July 20, 1981. At that time, counsel for appellant stated they were ready for trial.

The Supreme Court found since appellant was unable to supply a name or anything but an impressionistic description of the alleged witness after having approximately seven months to prepare for trial, it was hardly an abuse of discretion for the trial judge to determine that the case must go forward. The Court found it is well settled law in West Virginia that a trial judge need not grant a continuance due to the absence of a material witness when there is no evidence that the witness is within the jurisdiction or can be procured at any future time. *Woodruff v. Crilliam*, 179 S.E. 873 (W.Va. 1935)**.**

State v. Sheppard, 310 S.E.2d 173 (1983) (McGraw, C.J.)

At the *in camera* hearing conducted the morning of the first day of trial, counsel for the appellant requested a continuance to enable them to contact and interview certain witnesses whose testimony the appellant felt was material to his defense. Counsel stated the appellant had first given them the names and addresses of these witnesses and requested their presence at trial on the previous Friday, *and* that the witnesses apparently lived in North Carolina, although they weren't certain of that fact, and that all other defense witnesses had been subpoenaed.

Applies standards set forth in syl. pt. 1, *State v. Chafin*, 156 W.Va. 264, 192 S.E.2d 728 (1972). See *State v. Vance*, 285 S.E.2d 437 (W.Va. 1981). (Found in Vol. I under this topic.)

"To warrant a continuance on the basis of the absence of a material witness, it is necessary to show the use of due diligence to procure the attendance of the witness and also the materiality and importance of his evidence to the issues to be tried. *State v. Burdette*, 135 W.Va. 312, 63 S.E.2d 69 (1951)." Vance at 442.

CONTINUANCE

Absence of material witness (continued)

State v. Sheppard, (continued)

The Supreme Court found that here there was no showing of due diligence to secure the attendance of the witness the appellant requested. Counsel had apparently not intended to call them until the appellant requested their attendance, and counsel were uncertain where the witnesses lived and were unaware of any method to obtain service on such short notice. The Court noted it appeared the testimony of the absent witnesses was, in substance, the same as that of the defense witnesses which had been subpoenaed to testify. The Court found no error in the denial of the continuance.

Abuse of discretion

State v. Flint, 301 S.E.2d 765 (1983) (McHugh, J.)

Appellant contended the trial court abused its discretion in not allowing a continuance in order that appellant could obtain an expert witness from North Carolina on the issue of handwriting identity.

"In a criminal case, the granting or denial of a motion for continuance rests in the sound discretion of the trial court and the refusal to grant such continuance constitutes reversible error only where the discretion is abused." Syl. pt.4, *State v. Milam*, 159 W.Va. 691, 226 S.E.2d 433 (1976).

The facts of this case indicate that the appellant's mother was called as a witness by the prosecution to testify that a letter she had received was written by the appellant. After taking the stand she denied that the letter was written by her son. The appellant also decided that he too would no longer abide by his agreement not to contest the authenticity of the letter. The trial court ordered the appellant to furnish handwriting samples upon the prosecution's motion. The prosecution informed the appellant and the court that an expert witness would be called to compare handwriting. The next day, appellant moved for a continuance so he could bring in a handwriting expert from North Carolina. The Court overruled the motion, stating that if the appellant had a witness who was more readily available, he would be permitted a continuance. The appellant chose not to do so.

CONTINUANCE

Abuse of discretion (continued)

State v. Flint, (continued)

The Supreme Court found that the appellant's action, i.e., denial of the authenticity of the letter, resulted in handwriting becoming a contested issue in the case. The appellant waited a day before moving for a continuance in order that a handwriting expert from North Carolina might testify. In denying the motion the trial court gave the appellant reasonable opportunity to introduce testimony from a more readily available expert. The Supreme Court found that once the appellant chose to deny authorship of the letter it was incumbent upon him to secure the necessary witness without causing any undue delay in the trial. Appellant did no do so. The trial court did not abuse its discretion.

State v. Hodges, 305 S.E.2d 278 (1983) (McHugh, J.)

See CONTINUANCE Misunderstanding in plea negotiations, (p. 73) for discussion of topic.

State v. Angel, 319 S.E.2d 388 (1984) (Per Curiam)

See INEFFECTIVE ASSISTANCE Inadequate time to prepare, (p. 279) for discussion of topic.

Late disclosure of witnesses

State v. Trail, 328 S.E.2d 671 (1985) (Brotherton, J.)

Appellant's trial was scheduled for March 2, 1983. By letter hand-delivered on March 1, 1983, the State added five witnesses to its previous answer to appellant's motion for discovery.

CONTINUANCE

Late disclosure of witnesses (continued)

State v. Trail, (continued)

The morning the trial was scheduled to begin, defense counsel moved for a continuance on the basis they were not properly prepared for trial. They cited the additional witnesses as a specific reason. The trial court recessed prior to hearing any evidence and ordered the witnesses to remain until defense counsel had had a chance to interview them. The trial resumed the next morning.

The Supreme Court found the grant or denial of a motion for a continuance is a matter within the sound discretion of the trial court and will not be grounds for reversal unless the court abused its discretion. The Court also found the late production of court-ordered discovery without a showing of particular harm to the defendant's preparation of the case will not constitute error.

Here, the Court found neither an abuse of discretion nor prejudice. The Court found only two of the late-discovered witnesses testified for the State, and their testimony included no surprise evidence and the trial court alleviated any possibility of harm to the appellant's preparation of his defense by allowing defense counsel additional time to interview the new witnesses. The Court found no error.

Late production of discovery

State v. Zaccagnini, 308 S.E.2d 131 (1983) (Miller, J.)

See DISCOVERY Informant, (p. 118) for discussion of topic.

Misunderstanding in plea negotiations

State v. Hodges, 305 S.E.2d 278 (1983) (McHugh, J.)

Where representations by the court reasonably lead the defendant to believe that no suspended jail sentence shall be imposed and the trial judge indicates for the first time at the trial date that he intends to impose such a sentence, a continuance should be granted.

Misunderstanding in plea negotiations (continued)

State v. Hodges, (continued)

"The granting of a continuance is a matter within the sound discretion of the trial court . . .and the refusal thereof is not ground for reversal unless it is made to appear that the Court abused its discretion, in that its refusal has worked injury and prejudice to the rights of the party in whose behalf the motion was made." Syl. pt. 1, *State v. Jones*, 99 S.E. 271 (W.Va. 1919), in part.

Here, the Supreme Court found the failure to grant a continuance clearly prejudiced appellant. He failed to subpoena a witness and as a consequence presented no evidence in defense. The trial court abused its discretion in denying a continuance.

CONTROLLED SUBSTANCES

Accessory, aiding and abetting, principal

State v. Dameron, 304 S.E.2d 339 (1983) (Per Curiam)

See CONTROLLED SUBSTANCES Delivering, (p. 75) for discussion of topic.

Delivery

In general

State v. Tamez, 290 S.E.2d 14 (1982) (McHugh, J.)

Syl. pt. 4 - "[T]he possession and delivery (transfer) of a controlled substance are separate offenses, possession being an offense pursuant to *W.Va. Code*, 60A-4-401(c) [1971] and delivery and possession with the intent to deliver being an offense pursuant to *W.Va. Code*, 60A-4-401(a) [1971]." *State v. Rector*, 280 S.E.2d 597, 605 (W.Va. 1981).

Defendant's evidence that he possessed a controlled substance pursuant to a lawful prescription was inappropriate where the indictment charged defendant with a violation of *W.Va. Code*, 60A-4-401(a) (1971), delivery or possession with intent to deliver. Defendant was not charged with the unlawful possession of a controlled substance under 60A-4-401(c) (1971).

Defendant's conviction was for delivery where he sold controlled substances to an undercover narcotics agent.

State v. Dameron, 304 S.E.2d 339 (1983) (Per Curiam)

Appellant was convicted of accessory before the fact to the delivery of marijuana and was sentenced to one to five years in the penitentiary.

An undercover agent heard appellant make arrangements to sell marijuana to a bar tender at $420 per pound. Arrangements were made with the bartender to purchase part of it.

Delivery (continued)

In general (continued)

State v. Dameron, (continued)

An undercover agent heard appellant make arrangements to provide a bartender with marijuana at $420 per pound. The agent provided part of the purchase money for the bartender and another man to buy ½ pound. The agent's share was 1/4 pound, which he sent to the State Police lab for analysis.

The bartender testified that he got the marijuana from appellant and that appellant told him to get rid of it. Both the bartender and the agent testified as to appellant's open communication that the marijuana was available.

Appellant's communication of the fact that the marijuana was available was a positive act which facilitated the eventual delivery. Such communication, together with the instruction to get rid of the marijuana could only have been made with the specific intent to assist or aid in a sale or delivery by the bartender. Thus, when viewed in the light most favorable to the prosecution, *State v. Starkey*, 244 S.E.2d 219 (W.Va. 1978) there was sufficient evidence for the jury to conclude that appellant intended to assist in delivery of marijuana.

Constructive delivery

State v. Presgraves, 328 S.E.2d 699 (1985) (Per Curiam)

Appellant was convicted of delivery of a controlled substance and conspiracy to possess and deliver a controlled substance. The appellant approached an undercover informer working for the U.S. Navy in connection with an investigation of drugs being sold to Navy personnel and asked the informer if he wanted to buy marijuana. The informer said yes and appellant left and returned in an hour . When he returned the appellant instructed the informer to go to a pickup truck. There, the appellant's girlfriend handed the marijuana to the informer. The informer paid her for the drugs and she returned his change.

CONTROLLED SUBSTANCES

Delivery (continued)

Constructive delivery (continued)

State v. Presgraves, (continued)

The appellant contends his conviction for delivery of a controlled substance on the evidence which showed that his girlfriend possessed and delivered the marijuana was insufficient to support a verdict against him as a principal in the first degree.

The Court applied syl. pt. 4 of *State v. Ellis,* 161 W.Va. 40, 239 S.E.2d 670 (1977):

> Under *W.Va. Code*, 60A-1-101(f) [1971], 'constructive transfer' of a controlled substance means the transfer of a controlled substance belonging to an individual or under his control by some other person or agency at the instance or direction of the individual accused of such constructive transfer.

The Court found under the State's evidence, the appellant could have been found guilty as a principal in the first degree even though he did not personally make the sale.

Evidence

Examination of the substance

State v. Bennett, 304 S.E.2d 28 (1983) (Per Curiam)

See EVIDENCE Scientific tests, In general, (p. 192) for discussion of topic.

CONTROLLED SUBSTANCES

Instructions

Lesser included offense

State v. Ruddle, 295 S.E.2d 909 (1982) (Per Curiam)

Appellant contended that the court erred in failing in instructing the jury that a verdict of possession of marijuana was possible under his indictment for delivery of a controlled substance. The Supreme Court found that since there was no factual conflict on the issue of delivery (defendant claimed alibi as a defense), the evidence formed no basis for a lesser included offense instruction.

Officer's role in investigation

State v. Dameron, 304 S.E.2d 339 (1983) (Per Curiam)

State's instruction informing the jury that "in drug-related offenses the infiltration of drug operations and limited participation in their unlawful practices by law enforcement personnel is a recognized and permissible means of detection and apprehension" did not say that appellant was a member of a "drug operation" nor did it attack the appellant's character. The state was entitled to explain the officer's role in the drug investigation. The instruction did not direct the jury to give extra weight to the officer's testimony although the instruction was designed to enhance the officer's credibility as a witness. The instruction was not prejudicial.

Possession with intent to manufacture or deliver

State v. Boggess, 309 S.E.2d 118 (1983) (McHugh, J.)

See CONTROLLED SUBSTANCES Instructions, THC, (p. 79) for discussion of topic.

Instructions (continued)

THC

State v. Boggess, 309 S.E.2d 118 (1983) (McHugh, J.)

The State's chemist testified that the substance in question was marijuana and that it contained "THC." The appellant's expert at trial testified that the substance did not contain THC. The appellant asserted that if the substance he was charged with possessing with intent to deliver contained no THC, the substance was harmless and he could not be convicted under the indictment. Therefore he contended the trial court erred in refusing his instruction which made a jury finding of THC a requirement of guilt under the indictment.

Syl. pt. 3 - An instruction given to the jury in a case involving an alleged violation of the West Virginia Uniform Controlled Substance Act, *W.Va. Code*, 60A-1-101, *et seq*., which instruction definition of "marijuana" found in *W.Va. Code*, 60A-1-101(n) [1981], was not error.

The Supreme court noted that testimony concerning the presence of THC may be helpful in establishing that a substance is from that portion of the marijuana plant proscribed by the Uniform Controlled Substances Act, but they declined to adopt a requirement that an instruction must contain language as to the presence of THC in order to constitute the crime as defined by our act.

Manufacturing

In general

State v. Patton, 299 S.E.2d 31 (1982) (Per Curiam)

See CONTROLLED SUBSTANCES Sufficiency of evidence, (p. 82) for discussion of topic.

"The prohibition against manufacture of a controlled substance under *W.Va. Code*, 60A-1-101(m), includes a prohibition against the growing of marijuana since 'production' is a defined term of manufacture and 'production' under *W.Va. Code*, 60A-1-101(u), is defined to include planting, cultivating and growing." Syl. pt. 2, *State v. Underwood*, 281 S.E.2d 491 (W.Va. 1981).

Manufacturing (continued)

In general (continued)

State v. Patton, (continued)

"Under *W.Va. Code*, 60A-4-401(a), in order to prove the offense of manufacturing a controlled substance, it is not necessary to prove that the defendant possessed the controlled substance with intent to manufacture or deliver the same." Syl. pt. 4, *State v. Underwood*, 281 S.E.2d 491 (W.Va. 1981).

Lesser included offense

State v. Cabalceta, 324 S.E.2d 383 (1984) (Per Curiam)

Appellant was convicted of manufacturing marijuana. She contends on appeal the verdict form should have contained the lesser-included offense of possession. The defense presented was that the appellant did not participate in the manufacture of marijuana. The evidence offered by the state tended to prove that she was involved in the harvesting of marijuana, which is, by definition, manufacturing. Code, 60A-1101(n). Applying syl. pt. 2 of *State v. Neider*, 295 S.E.2d 902 (W.Va. 1982), the Court found there was no evidence to support a verdict of a lesser included offense.

Possession

State v. Tamez, 290 S.E.2d 14 (1982) (McHugh, J.)

See CONTROLLED SUBSTANCES Delivering, (p. 75) for discussion of topic.

State v. Patton, 299 S.E.2d 31 (1982) (Per Curiam)

See CONTROLLED SUBSTANCES Sufficiency of evidence, (p. 82) for discussion of topic.

CONTROLLED SUBSTANCES

Possession with intent to manufacture or deliver

State v. Tamez, 290 S.E.2d 14 (1982) (McHugh, J.)

See CONTROLLED SUBSTANCES Delivering, (p. 75) for discussion of topic.

State v. Patton, 299 S.E.2d 31 (1982) (Per Curiam)

See CONTROLLED SUBSTANCES Sufficiency of evidence, (p. 82) for discussion of topic.

State v. Boggess, 309 S.E.2d 118 (1983) (McHugh, J.)

The appellant asserted the evidence was insufficient to support his conviction of the offense of possession of marijuana with the intent to deliver.

The Supreme Court found the evidence submitted was such that the court properly refused to direct a verdict on behalf of the appellant and properly refused to consider the appellant's "attempt" theory.

Syl. pt. 1 - Where a conservation officer, employed by the West Virginia Department of Natural Resources, arrested an individual for the offense of possession of marijuana with the intent to deliver, which offense was committed in the presence of the officer, that arrest was authorized under the provisions of *W.Va. Code*, 20-7-4 [1971], which describes the authority, powers and duties of conservation officers.

Syl. pt. 2 - Following a valid arrest by a conservation officer, employed by the West Virginia Department of Natural Resources, for the offense of possession of marijuana with the intent to deliver, the conservation officer was authorized under the provisions of *W.Va. Code*, 20-7-4 [1971], which describes the authority, powers and duties of conservation officers, and *W.Va Code*, 62-1A-3 [1965], which statute concerns search and seizure, to execute a valid search warrant relating to the arrested individual's automobile, which automobile was found at the scene of the offense.

CONTROLLED SUBSTANCES

Sufficiency of evidence

Manufacturing

State v. Patton, 299 S.E.2d 31 (1982) (Per Curiam)

"The offense of possession of a controlled substance also includes constructive possession, but the State must prove beyond a reasonable doubt that the defendant had knowledge of the controlled substance and that it was subject to defendant's dominion and control." Syl. pt. 4, *State v. Dudick*, 213 S.E.2d 458 (W.Va. 1975).

"Mere proximity to narcotic drugs is not sufficient to convict a defendant of possession. The chain of evidence must link the defendant with the drugs to the extent that an inference may be fairly drawn that the defendant had knowledge of the presence of the drugs where they were found and exercised control over them." *State v. Dudick*, at 467.

The Supreme Court found that although there was no evidence presented at trial that appellant ever tended marijuana plant, the jury had before it properly introduced evidence and heard testimony from which it could have determined that the appellant knowingly possessed between six hundred and seven hundred live marijuana plants. The Court found that the jury could have fairly drawn an inference that the appellant knew the marijuana was growing on his rented property and knew that there were screen wires in and marijuana plants hanging from the rafters of the corncrib. The Court found that the evidence was sufficient for a conviction of manufacturing and possession with intent to manufacture marijuana.

State v. Dameron, 304 S.E.2d 339 (1983) (Per Curiam)

See CONTROLLED SUBSTANCES Delivering, (p. 75) for discussion of topic.

State v. Boggess, 309 S.E.2d 118 (1983) (McHugh, J.)

See CONTROLLED SUBSTANCES Possession with intent to manufacture or deliver, (p. 81) for discussion of topic.

CONTROLLED SUBSTANCES

Sufficiency of evidence (continued)

Manufacturing (continued)

State v. Cabalceta, 324 S.E.2d 383 (1984) (Per Curiam)

Appellant was convicted of manufacturing marijuana. She contends the evidence was insufficient to sustain the conviction. The Court found the testimony of two of the State's witnesses, along with the stipulation that marijuana was growing on the farm where appellant was staying, was sufficient to support the conviction. The Court found while there may have been some contradictory testimony, they viewed the evidence in the light most favorable to the State "because the jury's verdict of guilty is taken to have resolved the factual conflicts in favor of the State in recognition of the jury's role in evaluating the credibility of the witnesses." *State v. Atkins*, 261 S.E.2d 55 at 62-3 (W.Va. 1979).

THC

State v. Boggess, 309 S.E.2d 118 (1983) (McHugh, J.)

See CONTROLLED SUBSTANCES Instructions, THC, (p. 79) for discussion of topic.

CRITICAL STAGE

Pretrial deposition

State v. Cabalceta, 324 S.E.2d 383 (1984) (Per Curiam)

In footnote 4, the Court noted they did not decide whether a pretrial deposition of a potential prosecution witness is a critical stage requiring the presence of the accused. They found no harm where the appellant derived a benefit by using the deposition to impeach the witness. The Court noted counsel was not ineffective in allowing the deposition to proceed in the absence of his client.

Right belongs to defendant

State v. D.M.M., 286 S.E.2d 909 (1982) (Harshbarger, J.)

Syl. pt. 2 - The right to be present at all critical stages belongs to a defendant not his counsel. An effective waiver of a presence right can only be made by defense counsel when accompanied by testimony that a defendant has authorized counsel to continue in his absence.

Right to be present/harmless error

Arbogast v. R.B.C., 301 S.E.2d 827 (1983) (Per Curiam)

See JUVENILE Critical stage, (p. 346) for discussion of topic.

Right to counsel

Pre-trial court ordered psychiatric interview

State v. Jackson, 298 S.E.2d 866 (1982) (Harshbarger, J.)

See SELF-INCRIMINATION - STATEMENTS BY DEFENDANT Statements to court-appointed psychiatrist, (p. 490) for discussion of topic.

CRUEL AND UNUSUAL PUNISHMENT

Conditions of juvenile confinement

State ex rel. J.D.W. v. Harris, 319 S.E.2d 815 (1984) (McHugh, C.J.)

See JUVENILES Confinement, Cruel and unusual punishment, (p. 344) for discussion of topic.

Protective custody

Bishop v. McCoy, 323 S.E.2d 140 (1984) (McHugh, C.J.)

See PRISON/JAIL CONDITIONS Protective custody, (p. 417) for discussion of topic.

DEFENSES

Accidental killing

State v. White, 301 S.E.2d 615 (1983) (Per Curiam)

Appellant was convicted of second degree murder. She contends her instructions on the defense of accidental death were erroneously refused.

The Supreme Court noted that accidental death is a recognized defense to a murder charge in W.Va. and cites *State v. Legg*, 59 W.Va. 315, 53 S.E. 545 (1906) as having the most extensive discussion of the defense. The Court found that while the appellant's instructions correctly stated the law regarding the defense, no evidence was introduced to support this theory and the instructions were properly refused.

State v. Evans, 310 S.E.2d 877 (1983) (McHugh, J.)

Appellant was convicted of second degree murder. His defense to the murder charge was that the gun accidentally discharged. In support of his theory, he offered defendant's instruction No. 16, which read: "If you, the jury, believe from the evidence that the death of Ernie Hall was caused by an accidental discharge of the weapon introduced into evidence you shall find defendant not guilty as charged." The trial court refused the instruction.

The Supreme Court found the trial court committed reversible error in refusing the instruction. The Court found accidental death is a recognized defense to a murder charge in W.Va. and that the trial testimony of the appellant provided sufficient evidentiary support for the instruction on accident.

"A person may be guilty of involuntary manslaughter when he performs a lawful act in an unlawful manner, resulting in the unintentional death of another." Syl. pt. 2, *State v. Lawson*, 36 S.E.2d 26 (W.Va. 1945). In explicating this rule, the Court concluded "the State [is required] to show that the act, or the manner of the performance of the act, for which conviction [of involuntary manslaughter] is sought is unlawful and culpable and something more than the simple negligence, so common in everyday life, in which there is no claim that anyone has been guilty of wrong-doing." *State v. Lawson*, 128 W.Va. at 148, 36 S.E.2d at 32 (1945).

Accidental killing (continued)

State v. Evans, (continued)

The Supreme Court found that assuming the jury was properly instructed on the elements of involuntary manslaughter, Defendant's Instruction No. 16, if given, would not have precluded a verdict of guilty of involuntary manslaughter.

In syl. pt. 10, *State v. Legg*, 59 W.Va. 315, 53 S.E. 545 (1906) the Court stated:

> Where one, upon an indictment for murder, relies upon accidental killing as a defense, and there is evidence tending in an appreciable degree, to establish such defense, it is error to refuse to instruct the jury that if they believe from the evidence that the killing was the result of an accident, they should find the defendant not guilty.

The Supreme Court concluded in this case that the trial court's refusal to give a proper instruction on accidental discharge of the weapon constituted reversible error.

Alibi

State v. Hall, 304 S.E.2d 43 (1983) (Neely, J.)

See DISCOVERY Notice of alibi, (p. 119) for discussion of topic.

State v. Kopa, 311 S.E.2d 412 (1983) (McHugh, J.)

Appellant was convicted of first degree murder with a recommendation of mercy. The appellant alleged the trial court erred in giving an alibi instruction that unconstitutionally shifted the burden of proof from the prosecution to the appellant. The instruction read:

Alibi (continued)

State v. Kopa, (continued)

> The Court instructs the jury that where the State of West Virginia has established a Prime facie case and the defendant relies upon the defense of alibi, the burden is upon the defendant to prove it, not beyond a reasonable doubt, nor by a preponderance of the evidence, but by such evidence, and to such a degree of certainty, as will, when the whole evidence is considered, create and leave in the mind of the jury a reasonable doubt as to the guilt of the defendant.

In substantially the same form, this instruction was approved in *State v. Alexander*, 245 S.E.2d 633 (W.Va. 1978). In *Adkins v. Bordenkircher*, 674 F.2d 279, the U.S. Court of Appeals for the Fourth Circuit determined that the *Alexander* instruction was invalid. The Fourth Circuit criticized *Alexander's* characterization of alibi as an affirmative defense stating that it improperly shifted the burden of persuasion from the prosecution to the defendant with respect to alibi contrary to the definition of affirmative defense as set forth in *Patterson v. New York*, 432 U.S. 197 (1977).

The Supreme Court found the instruction, when read as a whole, clearly informed the jury that the prosecution had the burden of proving every element of the crime beyond a reasonable doubt and that the appellant was presumed to be innocent. The Court found the prosecution was not relieved of its legal burden to prove every element beyond a reasonable doubt as required by *In re Winship*, 397 U.S. 358 (1970), nor was any portion of that legal burden shifted to the defendant in violation of *Mullaney v. Wilbur*, 421 U.S. 68 (1975), nor could it create confusion under *Sandstrom v. Montana*, 442 U.S. 510 (1979).

However, in deference to the Fourth Circuit, the Supreme Court decided to follow the result reached in *Adkins*.

DEFENSES

Alibi (continued)

State v. Kopa, (continued)

Syl. pt. 1 - Because of the holding in *Adkins v. Bordenkircher*, 674 F.2d 279 (4th Cir.), *Cert. denied*, ___ U.S. ___, 103 S.C. 119, 74 L. Ed. 2d 104 (1982), *State v. Alexander*, 245 S.E.2d 633 (W.Va. 1978), is overruled to the extent that it permits the giving of an instruction that places the burden upon the defendant to prove his alibi defense sufficiently to create a reasonable doubt in the mind of the jury as to his guilt.

Syl. pt. 2 - The invalidation of the instruction approved in *State v. Alexander*, 245 S.E.2d 633 (W.Va. 1978), that places the burden upon the defendant to prove his alibi defense sufficiently to create a reasonable doubt in the mind of the jury as to his guilt is only applicable to those cases currently in litigation or on appeal where the error has been properly preserved at trial.

See case for extensive discussion on retroactivity, and retroactivity with regard to alibi instructions.

Compulsion or coercion

State v. Tanner, 301 S.E.2d 160 (1982) (Harshbarger, J.)

The appellant argued that the trial court erred in refusing to instruct the jury on the affirmative defense of compulsion or coercion. The appellant was convicted of aggravated robbery. He alleged that another person threatened to shoot him if he did not commit the robbery and also threatened to harm members of his family.

Syl. pt. 1 - In general, an act that would otherwise be a crime may be excused if it was done under compulsion or duress, because there is no criminal intent. The compulsion or coercion that will excuse an otherwise criminal act must be present, imminent, and impending, and such as would induce a well-grounded apprehension of death or serious bodily harm if the criminal act is not done; it must be continuous; and there must be no reasonable opportunity to escape the compulsion without committing the crime. A threat of future injury is not enough.

DEFENSES

Compulsion or coercion (continued)

State v. Tanner, (continued)

The Supreme Court found the appellant's instructions to be legally unobjectionable, and that if the evidence raised a reasonable doubt about his criminal intent to commit the offense charged, it would be a valid legal defense. However, the Supreme Court found that his only evidence was his uncorroborated testimony, thoroughly discredited by his tape-recorded confession.

The Supreme Court found no error by the trial court's refusal of the instructions.

State v. Lambert, 312 S.E.2d 31 (1984) (McGraw, J.)

See INSTRUCTIONS Court's responsibility for, (p. 300) for discussion of topic.

Diminished capacity

State v. Simmons, 309 S.E.2d 89 (1983) (Miller, J.)

See INSTRUCTIONS Diminished capacity, (p. 302) for discussion of topic.

Intoxication

State v. Less, 294 S.E.2d 62 (1981) (McHugh, J.)

It was not error for trial judge to give an instruction that correctly incorporated the law that a "person cannot voluntarily make himself drunk, intending to commit a crime, then claim immunity from punishment because of his condition when he committed the crime, the law not permitting a man to avail himself of the excuse of his own vice as a shelter from the legal consequences of such a crime" was not erroneous.

DENIAL OF FAIR TRIAL

In general

State v. Richey, 298 S.E.2d 879 (1982) (Miller, C.J.)

The appellant contended that error was committed when during the trial the State served a subpoena to have a defense witness appear before the grand jury after he had concluded his testimony. The Supreme Court found the service was not made in the presence of the jury and apparently received little or not notoriety, and that there was no specific facts asserted to show any prejudice to the defendant.

Conduct of trial judge

State v. Dye, 298 S.E.2d 898 (1982) (Per Curiam)

The defendant contended that the trial judge made a remark that he had "never seen a trial so difficult to proceed" within the hearing of the jury. The Supreme Court found that while it is certainly true that a circuit judge in West Virginia is held to a strict standard of impartiality, they found nothing in the alleged remark requiring reversal under the circumstances of this case.

State v. Bennett, 304 S.E.2d 28 (1983) (Per Curiam)

In a trial for delivery of a controlled substance, the State's chemist testified that in identifying the substance taken from appellant, he first looked at photographs in the *Physician's Desk Reference* (PDR) to give him some idea what the capsules were. He then performed an analysis which specifically identified the controlled substance. Following extensive cross-examination about the procedure used to identify the substance, the trial judge asked the chemist if the capsules taken from appellant matched the pictures in the PDR and then handed the PDR to the chemist instructing him to hold it up and show the picture to the jury. This was done over defense counsel's objection. The capsules had already been introduced into evidence.

It is highly improper for a trial judge to comment upon the weight of evidence or credibility of witnesses, or to indicate in any manner that he is a partisan for either side. An intimation of his opinion on the material fact in issue will constitute reversible error.

DENIAL OF FAIR TRIAL

Conduct of trial judge (continued)

State v. Bennett, (continued)

Syl. pt. 3 - "A trial judge in a criminal has a right to control the orderly process of a trial and may intervene into the trial process for such purpose, so long as such intervention does not operate to prejudice the defendant's case. With regard to evidence bearing on any material issue, including the credibility of witnesses, the trial judge should not intimate any opinion, as these matters are within the exclusive province of the jury." Syl. pt. 4, *State v. Burton*, 254 S.E.2d 129 (W.Va. 1979).

The Supreme Court found the trial judge's examination of the State's chemist was not harmless. The PDR was not offered into evidence, and, in fact, would not have been admissible to prove the identity of the substance inside the capsule. The judge's actions served to rehabilitate the State's witness and to indicate to the jury his opinion that the capsules were what they appeared to be. The judge's actions were prejudicial to appellant and required reversal.

Fluharty v. Wimbush, 304 S.E.2d 39 (1983) (Per Curiam)

It is improper and may be reversible error for a trial judge to comment on the credibility of a witness or the weight to be given to evidence.

Syl. pt. 2 - "It is not improper for a trial judge to express in the presence and hearing of the jury the mere legal basis of his ruling upon an objection to the admissibility of particular evidence." Syl. pt. 3, *Ellison v. Wood E. Bush Co.*, 153 W.Va. 507, 170 S.E.2d 321 (1969).

Trial judge's comment that trooper was qualified in the area of accident investigations followed a denial of appellant's motion to strike and was merely an expression of the legal basis for his reasoning; thus it was not reversible.

Conduct of trial judge (continued)

State v. Williams, 305 S.E.2d 251 (1983) (McGraw, J.)

Appellant was convicted of murder, arson and robbery. He alleged the trial court erred in addressing certain remarks to the jury panel during the juror selection process. It appeared that the appellant and his counsel had withdrawn from the courtroom when the trial judge made his comments to the panel. The error alleged was the failure of the court to have his remarks recorded.

Here, the Supreme Court found the appellant claimed no prejudice or error resulting from the trial court's remarks. During the hearing on the motion to set aside the verdict, the trial court placed on the record a summary of his remarks. The Supreme Court did not think these remarks were sufficiently prejudicial in and of themselves to warrant reversal. The court noted the better course is for the court reported to record any comments or remarks addressed to the jury by the trial court at any point in the proceedings, especially when the accused is not present. In the absence of even an allegation of prejudice or error resulting from the failure to have the remarks reported, the Supreme Court found no ground for reversal.

State v. Spence, 313 S.E.2d 461 (1984) (Per Curiam)

See JURY Court's comments, (p. 330) for discussion of topic.

State v. Bevins, 328 S.E.2d 510 (1985) (Neely, C.J.)

Syl. pt. 2 - "A trial court is not only permitted to take part in a trial but has the duty to do so in order to facilitate its orderly progress, and the remarks or conduct of the court in performing its duty will not constitute error if they are such as do not discriminate against or prejudice the defendant." Syl. pt. 4, *State v. Hankish*, 147 W.Va. 123, 126 S.E.2d 42 (1962).

DENIAL OF FAIR TRIAL (continued)

Cross-examination

State v. Foster, 300 S.E.2d 291 (1983) (Neely, J.)

See WITNESSES Impeachment, Prior inconsistent statements, (p. 611) for discussion of topic.

Cumulative effect of errors

State v. Hall, 304 S.E.2d 43 (1983) (Neely, J.)

Applies standards set forth in *State v. Smith*, 156 W.Va. 385, 193 S.E.2d 550 (1972). (See *State v. Crockett*, 265 S.E.2d 268 (W.Va. 1979) found in Vol. I under this topic.)

Appellant's errors were not numerous, and with the possible exception of the State's failure to provide its witness' criminal record, the errors did not prevent defendant from receiving a fair trial. Thus, the cumulative error doctrine cannot apply yo require reversal.

Drunk driving

Presence and activities of MADD members

State v. Franklin, 327 S.E.2d 449 (1985) (Neely, C.J.)

See DRUNK DRIVING Denial of a fair trial, Presence and activities of MADD members, (p. 140) for discussion of topic.

DENIAL OF FAIR TRIAL

Improper communications with jury

State v. Cox, 297 S.E.2d 825 (1982) (Per Curiam)

Defendant contended there was improper communication between a witness for the prosecution who was subpoenaed but did not testify, and two jurors. An evidentiary hearing was held on the issue. The trial judge determined the credibility of the witnesses and denied the defendant's motion for a new trial. The Supreme Court affirmed, finding the credibility of witnesses is a matter for the trier of fact to determine, and the trial court's decision to overrule the defendant's motion was amply supported by the record.

Interference with juror

State v. Dye, 298 S.E.2d 898 (1982) (Per Curiam)

See JURY Interference with juror, (p. 332) for discussion of topic.

Jury bias

State v. Audia, 301 S.E.2d 199 (1983) (McHugh, J.)

See JURY Challenges, Cause, (p. 321) for discussion of topic.

State v. Hodges, 305 S.E.2d 278 (1983) (McHugh, J.)

At a hearing on appellant's post-trial motions the judge and the defense counsel discussed the fact that, unknown to defense counsel at the time, the jury panel from which the jury for appellant's trial was selected had given a Christmas gift to the chief deputy of Sheriff Wellman, who was serving as the court's bailiff.

Sheriff Wellman was the only witness presented during the trial by the State. Defense counsel first became aware of the gift after jury selection when the jury was impaled to try the case.

DENIAL OF FAIR TRIAL

Jury bias (continued)

State v. Hodges, (continued)

The Supreme Court found that appellant's contention that he was prejudiced by the jury panel's gift to the bailiff strained credulity and they would not reverse on that ground alone. The Court did note that the practice of a jury panel giving gifts to circuit court officials and personnel is disapproved. A defendant in a criminal case must be afforded both the reality and the appearance of an impartial jury.

Notice of alibi rule

State v. Hall, 304 S.E.2d 43 (1983) (Neely, J.)

See DISCOVERY Notice of alibi, (p. 119) for discussion of topic.

Prejudicial publicity

State v. Williams, 305 S.E.2d 251 (1983) (McGraw, J.)

See MISTRIAL Prejudicial publicity, (p. 382) for discussion of topic.

Prosecutor's comments/conduct

State v. Sparks, 298 S.E.2d 857 (1982) (Per Curiam)

The appellant contended that the trial court should have declared a mistrial when the prosecuting attorney, during closing argument, implied that the appellant had a duty to call witnesses or produce evidence in his behalf. In the rebuttal portion of his closing argument, the prosecutor stated that the defense "could have brought Mrs. Malone if he wanted to or Mr. Malone."

DENIAL OF FAIR TRIAL

Prosecutor's comments/conduct (continued)

State v. Sparks, (continued)

The Supreme Court found that, as a general rule, in order to take advantage of allegedly improper remarks by a prosecuting attorney during closing argument, an objection must be made and counsel must request the court to instruct the jury to disregard them. In this case defense counsel chose to do neither. Therefore, the Supreme Court found that the trial court did not err in failing to instruct the jury to disregard the prosecutor's comments, where no objection nor request for such an instruction was made.

Applies standard set forth in syl. pt. 5, *State v. Ocheltree*, 298 S.E.2d 742 (W.Va. 1982). (Found in Vol. I under this topic.)

The Supreme Court found that although the prosecutor's comments may have been improper, they could not say that the trial court erred in failing to grant a mistrial based upon them alone. The Supreme Court found that when viewed in the context of the entire trial, they could not find that the remarks were prejudicial, or resulted in injustice being done.

State v. Richey, 298 S.E.2d 879 (1982) (Miller, C.J.)

In a sexual assault case, the appellant claimed that the prosecutor's use of a novel that was written by the defendant several years before the trial and which contained an incident of sexual interplay between adult and consenting juvenile males was prejudicial. The defense attorney advised the Court that he would not be placing the defendants character in issue and consequently the Court indicated the book could not be used. Even though the book was not used, it was left on counsel's table by the prosecutor during portions of the trial and the prosecutor picked the book up and underlined passages in it on several occasions. The prosecutor also asked the defense witness on cross-examination if she was familiar with or had read anything that the defendant had written.

The defense objected and the trial court advised the jury to disregard the question. The Supreme Court found that it did not appear that any contents of the book were disclosed to the jury.

DENIAL OF FAIR TRIAL

Prosecutor's comments/conduct (continued)

State v. Richey, (continued)

The Supreme Court did not approve of the tactics used by the prosecutors in this case, since the defendant's novel had no relevancy in view of the advanced declaration that his character would not be placed in issue. The Court found that the question directed at the defense witness was clearly contrary to the trial court's prior ruling that no reference was to be made to the book. The Court, however, did not find such an extensive and cumulative array of incidents in this case to reverse on this ground.

State v. Mullins, 301 S.E.2d 173 (1982) (Per Curiam)

The defendant contended that remarks made by the prosecutor during closing arguments about the defendant's failure to give a pre-trial statement were improper. The prosecutor's remarks were in response to defense counsel's remark in his closing argument. The Supreme Court found that the constitutional right to remain silent carries with it the right not to be impeached at trial over one's pre-trial silence. The Court did not find this principle to be applicable to this case since there was a generalized comment in the closing argument by the prosecutor in response to the defendant's statement in the same area.

State v. Flint, 301 S.E.2d 765 (1983) (McHugh, J.)

Appellant contended the trial court erred in permitting the prosecution to make two statements which were not supported by the evidence in its closing statements.

"The discretion of the trial court in ruling on the propriety of argument by counsel before the jury will not be interfered with by the appellate court, unless it appears that the rights of the complaining party have been prejudiced, or that manifest injustice resulted there from." Syllabus point 3, *State v. Boggs*, 103 W.Va. 641, 138 S.E. 321 (1927).

The Supreme Court found that after a careful review of the record, there was ample evidence presented at trial to support the two brief statements made by the prosecution in its closing argument.

Prosecutor's comments/conduct (continued)

State v. Bennett, 304 S.E.2d 28 (1983) (Per Curiam)

Appellant alleged that the trial court should have granted a mistrial due to repeated prejudicial comments by the prosecutor which allegedly referred to his criminal background and implied the defense had something to hide. Although the trial court denied appellant's motions for a mistrial, he did on each occasion give a cautionary instruction to the jury.

The appellant also complained of a comment by the prosecutor during closing that the defendant had not contradicted his expert witness' testimony. In the same sentence, the prosecutor also said that the defendant was not required to prove anything. Further, the court's charge to the jury told them that the defendant was not required to present any evidence.

Applying the standard set forth in syl. pt. 5, *State v. Ocheltree*, 298 S.E.2d 742 (W.Va. 1982), found in main text under this topic, the Supreme Court could not say that the prosecutor's comments clearly prejudiced appellant, or resulted in manifest injustice.

At appellant's trial for delivery of a controlled substance, the prosecutor repeatedly emphasized in summation that the State's evidence was uncontradicted or had been denied, that certain evidence had not been introduced, and that the only witnesses who testified said the defendant was guilty. Appellant's objections to these statements were overruled.

W.Va. Code, 57-3-6 (1923) provides that a defendant's failure to testify may not be commented upon before the court or jury by anyone.

Applies standard set forth in syl. pt. 3, *State v. Noe*, 230 S.E.2d 826 (W.Va. 1976). (See *State v. Nuckolls*, 273 S.E.2d 87 (W.Va. 1980) found in Vol. I under this topic.)

The Supreme Court found the prosecutor's statements that no one had denied that appellant sold the drugs amounted to an impermissible comment on the appellant's failure to testify. Appellant was the only one who could have denied that fact. In refusing to sustain appellant's objections to those statements, the trial judge committed reversible error.

DENIAL OF FAIR TRIAL

Prosecutor's comments/conduct (continued)

State v. Bennett, (continued)

While the Supreme Court has permitted isolated prosecutorial statements that did not specifically refer to the defendant's failure to testify, the Court suggests in this case that it will not tolerate argument that repeatedly emphasizes the absence of refutation by the defense.

State v. Hall, 304 S.E.2d 43 (1983) (Neely, J.)

Defendant's character was not put into issue when the prosecutor on re-direct asked the State's eyewitness why he lied. The witness' statement about being a dead man if anyone found out referred to retaliation by the Mafia, not defendant. The witness' comment about defendant's reputation was not responsive to the prosecutor's question. Objection to that comment was sustained and the statement stricken. There was no prosecutorial misconduct because the statement was not solicited.

Prosecutor's reference to prior testimony did not constitute prosecutorial misconduct when on cross-examination of appellant's alibi witness he called attention to the discrepancy in dates given by this witness and a previous witness. In light of "comparative testimony" considerations in *State v. Kinney*, 286 S.E.2d 398 (W.Va. 1982), the "prosecutor's worrying about this specific inconsistency was perhaps undesirably aggressive, but his vigorous pursuit of the State's case did not violate the tone of fairness and impartiality it is his duty to maintain."

Applies syl. pt. 3, in part, *State v. Boyd*, 233 S.E.2d 710 (W.Va. 1977). See *State v. Critzer*, 280 S.E.2d 288 (W.Va. 1981). (Found in Vol. I under this topic.)

Applies principles set forth in syl. pt. 3, *State v. Adkins*, 261 S.E.2d 55 (W.Va. 1979). (Found in Vol. I under EVIDENCE Comparative testimony.)

Prosecutor's comments/conduct (continued)

State v. Meadows, 304 S.E.2d 831 (1983) (McHugh, J.)

Applies standards set forth in syl. pt. 5, *State v. Ocheltree*, 298 S.E.2d 742 (W.Va. 1982). (Found in Vol. I under this topic.)

While the prosecuting attorney did misstate facts, his statement in his closing argument that witnesses had testified that a car was blue when, in fact, the witnesses only testified that the car was dark and did not clearly prejudice the appellant, nor did the statements result in manifest injustice. The appellant's objections to the comment had been sustained and a cautionary instruction had been given.

State v. Beckett, 310 S.E.2d 883 (1983) (Miller, J.)

The appellant was convicted of aggravated robbery. Three errors assigned on appeal involved allegedly prejudicial and misleading statements made by the prosecutor. During closing, the prosecutor stated in effect that the victim would not lie and that another state's witness, who had accompanied the defendant to the victims home the evening of the offense and remained outside, did not tell the jury everything that happened on the night of the robbery.

Applies standard set forth in syl. pt. 5, *State v. Ocheltree*, 298 S.E.2d 742 (W.Va. 1982). (Found in Vol. I under this topic.)

The Supreme Court did not believe these remarks were sufficiently prejudicial to constitute reversible error.

The appellant also contended the prosecutor misstated the law during closing argument when he explained to the jury that male law enforcement officers were not permitted to search women. The issue arose at trial because the two women who were with the appellant when he was arrested, claimed they had been searched.

DENIAL OF FAIR TRIAL

Prosecutor's comments/conduct (continued)

State v. Beckett, (continued)

The Supreme Court found that several law enforcement officers who testified denied that the women were searched, claiming it was either against the law or departmental policy for a male law enforcement officer to perform a body search on a woman. The Court found that in closing, the prosecutor simply repeated the no-frisk policy that the officers alleged was in effect, which tended to support the officers credibility.

State v. Bogard, 312 S.E.2d 782 (1984) (Per Curiam)

The appellant alleged the prosecutor, in his closing statements, improperly referred to the appellant's failure to testify. The Supreme Court found that the prosecutors' comments were only to the effect that the State's evidence was uncontradicted and that such comments are permissible.

State v. Angel, 319 S.E.2d 388 (1984) (Per Curiam)

Appellant contends the trial court erred in failing to grant a mistrial when the prosecutor in closing referred to a fact as "undisputed". He contends this was intended as a reference to his failure to testify.

Applies standard set forth in syl. pt. 1, *State v. McClure*, 253 S.E.2d 555 (W.Va. 1979). (Found in Vol. I under this topic.)

The Court found isolated remarks that the State's evidence was uncontradicted, without any reference to the defendant's failure to testify, are permissible.

The appellant contended the prosecutor's statement that the defense could have brought in psychiatrists and psychologists to testify that the defendant was crazy constitutes grounds for reversal when taken with the other comment. The Court found the trial court sustained an objection to the remark and instructed the jury to disregard it, stating "the defendant has no burden to bring anything into rebuttal of this nature." The Supreme Court found no prejudice to the appellant's case.

Prosecutor's comments/conduct (continued)

State v. Cabalceta, 324 S.E.2d 383 (1984) (Per Curiam)

Appellant was convicted of manufacturing marijuana. She contends she was denied a fair trial through the misconduct of the prosecutor who made inflammatory remarks, misstated the evidence, and asked questions all designed to characterize the appellant as the subject of a large and continuing investigation into drug-related crimes. During the trial, the prosecutor asked Michael Hogan, an accomplice, "Did I subsequently tell you you independently verified other information?" A general objection was sustained, and the jury was instructed to disregard the question. During closing, the prosecutor tried to vouch for the credibility of two state's witnesses. Objection was made. The judge instructed the jury to decide the case on the evidence and the law, not the prosecutor's opinion.

The Court did not find any reversible error in the conduct of the prosecuting attorney. In footnote 3, the court noted that other alleged misconduct, to which there was no objection, would not be considered.

State v. Clements, 334 S.E.2d 600 (1985) (Brotherton, J.)

The appellant was convicted of murder and voluntary manslaughter. He contends the prosecution should have limited its use of the term "body bags". In footnote 9 the Supreme Court found in the trial of the brutal murder of two young women, it is unreasonable to expect the State to put on a case which reads like a nursery rhyme. The Court found the court should step in only where the inflammatory nature of these comments would prejudice the jury in such a way as to outweigh any probative value of the statements. The Court found the term "body bags" is not so inflammatory a term that the trial court abused its discretion in refusing to order the prosecution to limit its use.

Appellant also contends the prosecutor erred in making a "golden rule argument". The Supreme Court found the prosecutor's argument was not a "golden rule" type argument. The Court found the distinguishing feature of a golden rule argument is that the jurors are urged to put themselves in the place of the victim or the victim's family. The Court found the state may properly call the jury's attention to the plight of the victims and the nature of the crime so long as it does not take the extra step and ask the jury to "put yourself in the place of . . . .".

DENIAL OF FAIR TRIAL

Prosecutor's comments/conduct (continued)

State v. Clements, (continued)

Syl. pt. 4 - Only an argument that urges the jurors to put themselves in the place of the victim or the victim's family is an improper "golden rule" argument.

Prosecutorial overmatch

State v. Clements, 334 S.E.2d 600 (1985) (Brotherton, J.)

Appellant was convicted of murder and voluntary manslaughter. He contends there was an oppressive overmatch favoring the prosecution. In footnote 10, the court found they would declare such an overmatch if there is a showing on the record that defense counsel failed to object to incompetent evidence of a highly prejudicial nature introduced by the prosecution at trial, or if there is other similar evidence of gross incompetence or inexperience. The Court found the record in this case discloses no such gross defects in the defense.

Refusal of trial judge to recuse

Appellant contended the trial judge's refusal to recuse himself on account of a possible association with the victim was reversible error. The Supreme Court found there was no development of facts to support the motion and they could not ascertain from the record whether there was any potential prejudice. Because of the presumption of regularity attendant on trial court proceedings, the Court presumed that there was not.

Right to public trial

State v. Richey, 298 S.E.2d 879 (1982) (Miller, J.)

Where a defendant moves to exclude members of the public from observing his jury trial. The ultimate question is whether, if the trial is left open, there is a clear likelihood that there will be irreparable to the defendant's right to a fair trial.

DENIAL OF FAIR TRIAL

Right to public trial (continued)

State v. Richey, (continued)

In this sexual assault case, the appellant claimed that he was prejudiced by the trial court's permitting a group of high school students to be present at the trial during the victims testimony. The Supreme Court found that the presence of high school students could not be shown to irreparably damage the defendant's right to a fair trial.

Use of exhibits not in evidence

State v. Ashcraft, 309 S.E.2d 600 (1983) (McGraw, C.J.)

Appellant contended the prosecution impermissibly exhibited an AR-15 rifle during closing arguments to inflame the jury and prejudice them against him. The rifle had not been admitted into evidence, but had been used as an aid by prosecution witnesses in demonstrating the manner in which spent cartridges would be ejected.

The Supreme Court found they were unable to verify from the record these assertions and that since appellant's conviction was reversed on other grounds it was unnecessary to rule on this issue. The Court cautioned the lower court that it should cautiously examine the use during closing arguments of exhibits which have not been admitted into evidence. The Court noted that demonstrative exhibits cannot be offered solely to appeal to the emotions or passions of the jury and depending upon their impact, their use may rise to the level of prejudicial error.

DETAINER

See EXTRADITION, (p. 199).

Trial after transfer to original place of imprisonment

State ex rel. Fetters v. Hott, 318 S.E.2d 446 (1984) (Neely, J.)

Relator was incarcerated in Maryland under a five year sentence. A detainer was filed in West Virginia against him and he was transported to this state. He remained in West Virginia approximately three months and was taken back to Maryland for a probation hearing. Only the jail officials in West Virginia were consulted before this transfer took place. Thirty-four days later, relator was returned to W.Va. to stand trial. The trial court refused to dismiss the charge finding that although the return was illegal, it was not authorized by court order. The trial court also relied on a distinction between formal and informal removals in refusing to dismiss the charge.

W.Va. Code 62-14-1 (1971) provides if a trial is not had prior to the return of the prisoner to the sending state, the court must dismiss the charge(s) with prejudice.

The Supreme Court found this case is distinguishable from *Moore v. Whyte*, 266 S.E.2d 137 (W.Va. 1980) in that here, there was no infringement of the mandatory time within which the defendant must be tried. The court rejected the trial court's formal/informal removal distinction finding it had no statutory basis. However, the Court found it would undermine the intent of the statutory scheme if it developed a firm rule prohibiting transfers in such cases. The Court found the transfer of relator back to Maryland for a probation hearing was in relator's best interest and did not injure or prejudice him. The Court found the Agreement on Detainers Act must be looked at as a whole and not interpreted by taking a specific provision out of context.

Syl. pt. 1 - Under *W.Va. Code* 62-14-1 (1971), the Agreement on Detainers, the transfer of an inmate from West Virginia back to the sending jurisdiction before trial in West Virginia, but before the expiration of the statutorily mandated period of 180 days, does not preclude prosecution in West Virginia on the charges for which the inmate was originally sent to this State merely because the inmate was temporarily returned to the sending State when such return was effected for the benefit of the inmate.

DISCOVERY

Bill in particulars

In general

State v. Fairchild, 298 S.E.2d 110 (1982) (McGraw, J.)

"The granting or denial of a motion for a bill of particulars . . . rests in the sound discretion of the trial court, and unless it appears that such discretion is abused the ruling of the trial court will not be disturbed." Syl. pt. 7, in part, *State v. Nuckolls*, 153 W.Va. 736, 166 S.E.2d 3 (1969).

The Supreme Court found that in this case the motion for a bill of particulars was not presented to the court until the morning of the trial, yet the prosecutor had employed an "open file" policy with defense counsel since the date of the indictment. The Court found that the appellant, thus, already had access to any information discoverable through a bill of particulars and that the trial court did not abuse its discretion in denying the motion.

State v. Meadows, 304 S.E.2d 831 (1983) (McHugh, J.)

A bill of particulars is a discovery device. A bill of particulars is for the purpose of furnishing details omitted from the accusation or indictment, to which the defendant is entitled before trial.

Any lack of specificity with regard to details in an indictment are discoverable upon a motion for a bill of particulars.

Syl. pt. 3 - The ruling of a trial court concerning the sufficiency of a bill of particulars will not be reversed on appeal unless the trial court abused its discretion.

Where the state offers an erroneous answer in a bill of particulars, it is similar to the situation of a nondisclosure.

Applies standards set forth in Syl. pt. 2, *State v. Grimm*, 270 S.E.2d 173 (W.Va. 1980). (Found in Vol. I under DISCOVERY Nondisclosure). "[T]he relevant inquiry under this standard is prejudice to the defendant resulting either from surprise on a material issue or where the nondisclosure

DISCOVERY

Bill of particulars (continued)

In general (continued)

State v. Meadows, (continued)

hampers the preparation and presentation of the defendant's case." *State v. Hatfield*, 286 S.E.2d 402, 412 (W.Va. 1982).

Appellant questioned the time of the murder specified in a bill of particulars. He asserted that it was at variance with the evidence. Using the *Grimm/ Hatfield* standard, the Supreme Court held that appellant was neither hampered in the preparation or presentation of his case, nor was he surprised.

Therefore, the trial court did not abuse its discretion in determining that no prejudice resulted to the appellant by the approximation of the time period.

Principal in first or second degree

State v. Ashcraft, 309 S.E.2d 600 (1983) (McGraw, J.)

See HOMICIDE Bill of particulars, Principal in first or second degree, (p. 220) for discussion of topic.

Results of polygraph exams

State v. Gum, 309 S.E.2d 32 (1983) (McGraw, J.)

The appellant alleged the trial court erred in denying his request through a bill of particulars for the production of the questions asked, the answers given and the scientific results of two polygraph examinations given a witness for the State. The Supreme Court found the appellants contention that this limited his ability to prepare for trial was without merit.

The Court found the record indicated that the trial court granted liberal discovery to the appellant. Furthermore, the State provided a copy of an investigatory report prepared by its officers which included two separate statements given by the witness, which were in effect his answers to the two separate polygraph examinations.

DISCOVERY

Bill of particulars (continued)

Results of polygraph exams (continued)

State v. Gum, (continued)

The report contained a narrative by police officers. The full contents of each polygraph examination were disclosed to the appellant at trial during an *in camera* hearing concerning their admissibility. The Supreme Court found no exculpatory material appeared in either of the examinations and the trial court did not abuse its discretion by its failure to require disclosure of these polygraph examinations.

Confidential information

State v. Clements, 334 S.E.2d 600 (1985) (Brotherton, J.)

The appellant contends the trial court erred in refusing to grant all of the required bill of particulars. The Supreme Court found the only information which was withheld from the defense was confidential under *State v. Tamez*, 290 S.E.2d 14 (W.Va. 1982) (identity of informant), or items which were work product. The Court found no error.

Failure to disclose

In general

State v. Cox, 297 S.E.2d 825 (1982) (Per Curiam)

The State called a witness in rebuttal to rebut the defendant's alibi. The trial court, upon reflection, ruled that the State's failure to provide the defendant with the witness' name violated the Court's standing order the State notify the defense of rebuttal witnesses who may be called if the defendant takes the stand. The trial judge directed that the witness' testimony be stricken and instructed the jury to disregard it.

DISCOVERY

Failure to disclose (continued)

In general (continued)

State v. Cox, (continued)

The Supreme Court found that under the circumstances of this case, any error in initially admitting the witness' testimony was not prejudicial to the defendant and was harmless in view of another rebuttal witness' testimony which was not challenged.

State v. Dye, 298 S.E.2d 898 (1982) (Per Curiam)

The defendant alleged that the trial court erred in denying him police reports and records, a list of all persons known to the State possessing knowledge of the crime and all statements of prosecution witnesses or memoranda of interviews with those witnesses. The Supreme Court applied *State v. Moran*, 285 S.E.2d 450 (W.Va. 1981) and found that there was no indication that the reports sought were used to refresh recollection, nor was there any prejudice or surprise at denial of defendant's motion to produce demonstrated.

With regard to the defendant's request for the names, telephone numbers, and addresses of all persons known to the prosecution or its investigators having information about the charges against the defendant, and the defendant's allegation that the trial judge erred in failing to order the State to turn over all documents or papers or objects prepared by counsel for the State which consisted of narrative statements or memoranda of interviews which was non-exculpatory, the Supreme Court found that the trial court ordered the prosecution to disclose all exculpatory evidence and a list of the prosecutions witnesses was made available to the defendant. Extensive discovery was permitted. The Court concluded that the trial court did not abuse its discretion in refusing these requests.

State v. Hall, 304 S.E.2d 43 (1983) (Neely, J.)

See WITNESSES Impeachment, prior convictions, (p. 609) for discussion of topic.

DISCOVERY

Failure to disclose (continued)

In general (continued)

State v. Meadows, 304 S.E.2d 831 (1983) (McHugh, J.)

See DISCOVERY Bill of particulars, (p. 107) for discussion of topic.

State v. Taylor, 324 S.E.2d 367 (1984) (Per Curiam)

Appellant contends his conviction for four counts of breaking and entering should be reversed because the State failed to provide him with photographs taken of the crime scenes; results of laboratory tests of blood found at one of the crime scenes; and measurements of a footprint found in the snow near another crime scene.

The State did not introduce any of this evidence.

Prior to trial, the appellant made a demand, pursuant to Rule 16, *W.Va.R.Crim.P.*, for the production of such evidence. He also made general, written and oral requests for disclosure of exculpatory information. The state filed a disclosure prior to trial, but included no blood tests, footprint measurements or photographs.

The Court found it was clear from the record that the appellant and his counsel were aware of footprint and blood evidence. The Court found it was revealed on direct that blood was found on the floor of one of the crime scenes. On cross-examination, defense counsel asked whether samples were taken. The witness replied that the blood type was ascertained, but counsel did not pursue the matter further or ask for production of the report identifying the blood type.

During cross-examination, a state witness revealed the existence of crime scene photographs and the footprint measurements. Defense counsel demanded that the evidence be produced. After discussion between counsel and the court on whether this evidence was exculpatory or discoverable under Rule 16, the court deferred ordering discovery, stating that the matter would be taken up later. The matter was not thereafter pursued by defense counsel during trial, in the motion for judgement of acquittal at the close of the State's case, or in the motion for a new trial.

DISCOVERY

Failure to disclose (continued)

In general (continued)

State v. Taylor, (continued)

The Court found there was no abuse of discretion by the trial judge in not ordering disclosure, under Rule 16, in light of the State's election not to seek admission of the evidence and the abandonment by defense counsel of the requests for production of the blood tests, photographs, or footprint measurements.

The Court found defendant's alternate ground that the evidence was exculpatory is unsupported by the record. The appellant's only argument in this regard is that the State chose not to use the evidence in its prosecution of the appellant, despite the fact that he had been led to believe the blood samples and footprint to be incriminatory. The Court found this argument to be unpersuasive. They found election by the State not to use evidence against a criminal defendant does not, *ipso facto*, mean that such evidence is exculpatory.

State v. Boykins, 320 S.E.2d 134 (1984) (Per Curiam)

The appellant contends his due process rights were violated by the failure of the State to produce photographs allegedly taken of the two lineups in which he participated. The Court found the preponderance of the evidence indicates the photos were taken but the film was lost or misplaced and was not in the State's possession at the time of trial.

The Court found the prosecution in this case would have had a constitutional duty to disclose the photographs if they had been in its possession. Since they were not in the government's possession at the time of trial, the Court could not find the appellant's due process rights were violated.

DISCOVERY

Failure to disclose (continued)

In general (continued)

State v. Manns, 329 S.E.2d 865 (1985) (Miller, J.)

Appellant contends he was prejudiced because the state, in its discovery responses, did not list a .22 caliber rifle not found at the scene of the crime as a potential exhibit. The Supreme Court did not find this to be reversible error. The Court found the rifle was not placed into evidence as the State was not able to prove it was the murder weapon, and the defendant was informed in discovery of the ballistics report by the State's expert which revealed two .22 caliber rifles had been examined. The Court also found that when the ballistics expert testified and made reference to this rifle, no objection was made by the defendant. The Court found no error.

State v. Clements, 334 S.E.2d 600 (1985) (Brotherton, J.)

Appellant was convicted of murder and voluntary manslaughter. The defense was forewarned that the State intended to call an expert to testify that the blood found in the appellant's van was similar to the blood found in the victims family. Nevertheless, the appellant contends the State went beyond the scope of this disclosure by putting on evidence that only 2.4 percent of the population has this blood type. The Supreme Court did not believe that the expert's testimony was such a deviation from what the defense was told that the trial court could not in a reasonable exercise of its discretion have allowed this evidence to be introduced.

Exculpatory evidence

State v. Jacobs, 298 S.E.2d 836 (1982) (Per Curiam)

The appellant contended that the prosecuting attorney suppressed exculpatory evidence in the form of a letter written by the State's chief witness prior to trial. The Supreme Court found no error since there was nothing in the evidence to indicate that the prosecutor acted improperly in not including the letter in the statement of disclosure; since the witness did not recant his

DISCOVERY

Failure to disclose (continued)

Exculpatory evidence (continued)

State v. Jacobs, (continued)

testimony in the letter or on the stand and it appeared his reasons for deciding against testifying were not related to any coercive tactics on the part of the State; and since defense counsel was supplied with a copy of the letter prior to trial and agreed that it was of no value to the defense.

State v. Taylor, 324 S.E.2d 367 (1984) (Per Curiam)

See DISCOVERY Failure to disclose, In general, (p. 111) for discussion of topic.

State v. Hall, 304 S.E.2d 43 (1985) (Miller, J.)

Relator was convicted of first degree murder. About two days after his murder conviction, a state trooper played for relator a tape recording of an interview with Russell Green, the State's chief witness at trial and only eyewitness to the crime. In this interview, Green stated Hall shot the victim five times from inside a car and that the car window on the drivers side must have been broken from the inside by a shot passing through the victim's head. Green testified at trial that Hall fired three shots inside the car, exited the car on the passenger side, walked around to the drivers side and fired two more shots through the driver side window.

The Court found it was clear that Hall specifically requested Green's prior statements and that the taped statement was not provided to him. The question presented is whether the government's failure to disclose to the defense favorable information which was specifically requested amounts to a violation of due process vitiating relator's conviction.

DISCOVERY

Failure to disclose (continued)

Exculpatory evidence (continued)

State v. Hall, (continued)

The Court found they emphasized in relator's first appeal that Green's credibility was the most important issue in the case, that his testimony carried many indicia of unreliability and that a reasonable doubt "might well have been created by even insubstantial additional impeachment" of Green. 304 S.E.2d at 48. The Court found viewing the record as a whole, we conclude that the jury's verdict might have been different had the jury been allowed to hear Green's prior inconsistent statement, that a reasonable doubt might have been created.

The Court found although the prosecution argues that he had an open file policy, this policy does not excuse his failure to disclose the tape recording. Even if the prosecution was unaware of the tape's existence, which the Court found unlikely considering all the circumstances, what the trooper knew must be imputed to the prosecution. The Court found they discussed in *State v. Watson*, 318 S.E.2d 603 (W.Va. 1984), "a prosecutor is required to disclose statements to which he has access even though he does not have the present physical possession of the statements."

Syl. pt. 1 - "A Prosecution that withholds evidence which if made available would tend to exculpate an accused by creating a reasonable doubt as to his guilt violates due process of law under Article III, Section 14 of the West Virginia constitution." Syllabus Point 4, *State v. Hatfield*, 286 S.E.2d 402 (W.Va. 1982).

Habeas corpus proceeding

Gibson v. Dale, 319 S.E.2d 806 (1984) (McGraw, J.)

See HABEAS CORPUS Discovery, (p. 212) for discussion of topic.

DISCOVERY

Indictments

State v. Sheppard, 310 S.E.2d 173 (1983) (McGraw, J.)

The appellant contended the eight-month delay in furnishing him with copies of the indictments and warrants constituted reversible error.

The Supreme Court noted that the appellant did not request copies of the indictments until Aug. 1979 and that the production of those documents were promptly ordered and accomplished. The Court noted no statute or constitutional provision requiring that a defendant in a criminal case be provided with copies of the warrants for his arrest. The Court found that in view of the fact appellant's request for copies of the arrest warrants was honored some eight months before his trial, and since no discrepancy or irregularity in the warrants was alleged, they found no errors in the failure to provide copies of the warrants before Aug. 1979.

Informant

State v. Tamez, 290 S.E.2d 14 (1982) (McHugh, J.)

Syl. pt. 1 - Applies standard set forth in syl. pt. 1, *State v. Haverty*, 267 S.E.2d 727 (W.Va. 1980). (Found in Vol. I under this topic.)

Under the circumstances of this case where informant introduced trooper to defendant but was not involved in the actual sale of the controlled substance, defendant was not entitled to have identity of confidential government informant disclosed. The trial court did not commit error in failing to require disclosure.

Syl. pt. 3 - When the State in a criminal action refuses to disclose to the defendant the identity of an informant, the trial court upon motion shall conduct an *in camera* inspection of written statements submitted by the State as to why discovery by the defendant of the identity of the informant should be restricted or not permitted. A record shall be made of both the in court proceedings and the statements inspected *in camera* upon the disclosure issue. Upon the entry of an order granting to the State nondisclosure to the defendant of the identity of the informant, the entire record of the *in camera* inspection shall be sealed, preserved in the records of the court, and made

Informant (continued)

State v. Tamez, (continued)

available to this Court in the event of an appeal. In ruling upon the issue of nondisclosure of the identity of an informant, the trial court shall balance the need of the State for nondisclosure in the promotion of law enforcement with the consequences of nondisclosure upon the defendant's ability to receive a fair trial. The resolution of the disclosure issue shall rest within the sound discretion of the trial court, and only an abuse of discretion will result in reversal. *W.Va.R.Crim.P.* 16(d)(1).

State v. Bennett, 304 S.E.2d 28 (1983) (Per Curiam)

Prior to trial, the appellant by motion sought disclosure of the name of the confidential informant, so that he might interview him for possible use as a witness at trial. The State opposed the disclosure, and after a hearing, the trial court found the informant did not participate in the sale in any way and that disclosure of his name would endanger him and undermine law enforcement efforts and overruled the motion.

On appeal, the appellant contended the court's refusal to order this disclosure violated his rights to due process and to compulsory process to secure the attendance of witnesses.

Applies to standard set forth in syl. pt. 1, *State v. Haverty*, 267 S.E.2d 727 (W.Va. 1980). (Found in Vol. I under this topic.)

The Supreme Court noted that in *State v. Tamez*, 290 S.E.2d 14 (W.Va. 1982) they held that in ruling upon a motion for disclosure the trial court must balance the State's need for nondisclosure against its consequences upon the defendant's ability to receive a fair trial, resolution of the nondisclosure issue shall rest within the sound discretion of the trial court, and only an abuse of discretion will result in reversal. The Court noted that in *State v. Walls*, 294 S.E.2d 272 (W.Va. 1982), they said that disclosure might be required where the informant was a direct participant in, or a material witness to, the crime.

DISCOVERY

Informant (continued)

State v. Bennett, (continued)

Appellant contended he should have been allowed to interview the informant as a potential witness. The Court noted the informant merely introduced the officer to the appellant and did not witness nor participate in the sale. Therefore, appellant had not been deprived of a witness.

The Supreme Court found nothing in the record to indicate that appellant's defense would have been aided by the disclosure, or that it was necessary to ensure a fair trial. The undercover officer testified that disclosure would endanger the informants life and force the premature termination of ongoing investigations. The Supreme Court held the trial court did not err or abuse its discretion in overruling appellant's motion for disclosure of the confidential informant.

State v. Zaccagnini, 308 S.E.2d 131 (1983) (Miller, J.)

Defendant contended the trial court erred in refusing to grant a continuance on the afternoon before the trial, when the prosecution first disclosed the name and its intention to use an informant as a witness for the State.

"A common law privilege is accorded the government against the disclosure of the identity of an informant who has furnished information concerning violations of law to officers charged with the enforcement of the law. However, disclosure may be required where the defendant's case could be jeopardized by nondisclosure." Syllabus point 1, *State v. Haverty*, 267 S.E.2d 727 (W.Va. 1980).

"The general rule is that where the informant has only peripheral knowledge of the crime, his identity need not be disclosed. Where the informant directly participates in the crime, or is a material witness to it, disclosure may be required, particularly where, in a drug related crime, he is the only witness to the transaction other than the defendant and the buyer. Syl. pt. 5, *State v. Walls*, 294 S.E.2d 272 (W.Va. 1982).

DISCOVERY

Informant (continued)

State v. Zaccagnini, (continued)

If the government has an obligation to identify an undercover informant, its failure to will not ordinarily be error if the defense was already aware of the identity.

Here, The defendant admitted in cross he had known the informant for two years prior to his arrest. He did not deny that the informant had been in his store on the day of the arrest. Also, the actual drug transaction which the informant participated in was witnessed by police who were outside the store watching the drug buy. The Supreme Court found the informant's testimony was not absolutely critical to the State's case. The Court found no error in the trial court's refusal to grant a continuance.

Late disclosure of witnesses

State v. Trail, 328 S.E.2d 671 (1985) (Brotherton, J.)

See CONTINUANCE Late disclosure of witnesses, (p. 72) for discussion of topic.

Late request for psychiatric exam

State v. Simmons, 309 S.E.2d 89 (1983) (Miller, J.)

See INSANITY Late request for psychiatric exam, (p. 286) for discussion of topic.

Notice of alibi

State v. Hall, 304 S.E.2d 43 (1983) (Neely, J.)

Syl. pt. 5 - Rule 12.1, *W.Va.R.Crim.P.*, which requires criminal defendants to respond to a prosecutor's request for notice of intent to offer an alibi defense, is not unconstitutional.

DISCOVERY

Notice of alibi (continued)

State v. Hall, (continued)

The notice-of-alibi rule is part of a reciprocal discovery scheme and does not deprive criminal defendants of either due process or a fair trial.

Right to grand jury minutes and transcript

***State v. Louk*,** 301 S.E.2d 596 (1983) (Harshbarger, J.)

Defendant moved for production of grand jury minutes and transcript, and was denied. The Supreme Court found defendant's pre-trial motion and arguments presented no grounds for requesting disclosure. (In footnote 4 the Court noted a defendant is entitled to his own recorded grand jury testimony without any showing.) At a minimum, most courts require a showing of "particularized need" for pre-trial disclosure. Disclosure of grand jury testimony during trial for purposes of impeachment or cross-examination is not involved here. The Supreme Court concluded there was no abuse of discretion in denying defendant's disclosure motion.

State v. Bennett, 304 S.E.2d 28 (1983) (Per Curiam)

Prior to trial, the appellant sought disclosure of the grand jury testimony of a police officer, based upon supposed differences between his testimony and information contained in the police report provided to the defense. The trial court denied disclosure, but granted appellant's oral motion to transcribe the grand jury minutes for the court's *in camera* inspection and for possible use by the defense at trial should the testimony prove to be inconsistent with his grand jury testimony. The appellant did not object to this ruling. The trial court reviewed the transcript at the conclusion of the officer's trial testimony and found no material discrepancy and did not release the grand jury transcript. The transcript was sealed by court order and was transmitted to the Supreme Court for review. The appellant acknowledged that *W.Va.R. Crim.P.*, Rule 26.2 (1981) did not control because it went into effect after appellant's conviction. He maintained, however, that he made a showing of "particularized need" under *Dennis v. United States*, 384 U.S. 855 (1966) which required the production of the grand jury transcript.

DISCOVERY

Right to grand jury minutes and transcript (continued)

State v. Bennett, (continued)

The Supreme Court found that *Dennis* dealt with the disclosure of federal grand jury testimony under federal rules and statutes and had no application here. The Court noted, however, that even under the appellant's analysis the trial court did not err. It would have been useful for any of the purposes set forth in *Dennis,* and even if denial of the transcript is an error, the Court found it could have been prejudicial to appellant's defense.

Right to police reports

State v. Audia, 301 S.E.2d 199 (1983) (McHugh, J.)

The appellant contended that the denial of his pretrial requests for police reports and statements made by certain witnesses to investigate officers was error.

The Supreme Court found that police reports are not generally discoverable, unless they are used at trial to refresh recollection at which time they must be disclosed to the defense for use in cross-examination. Similarly, a defendant is only entitled to examine prior statements of prosecution witnesses who testify against him, for the purpose of cross-examination.

The Supreme Court found that the court granted appellant's motion for disclosure of all exculpatory information, to which he was properly entitled. Further, the trial court ordered the State to provide appellant with a list of witnesses along with a brief synopsis of their testimony. Since no exception was applicable here, any further discovery was within the sound discretion of the trial court and the Supreme Court found no abuse of that discretion.

Syl. pt. 8 - Subject to certain exceptions, pretrial discovery in a criminal case is within the sound discretion of the trial court.

DISCOVERY

Right to statements of prosecution witnesses

State v. Audia, 301 S.E.2d 199 (1983) (McHugh, J.)

See DISCOVERY Right to police reports, (p. 121) for discussion of topic.

State v. Watson, 318 S.E.2d 603 (1984) (Miller, J.)

The appellant assigned as error the trial court's refusal to allow him to examine a witness's pretrial statement. At trial, a police officer testified regarding the photographic array identification procedure. Defense counsel then requested he be provided with any statements made by the officer. The prosecutor responded the witness had made no written statement. Defense counsel stated the rule applied to grand jury testimony which has been recorded or transcribed. The trial court denied the motion as unreasonable since there would be a delay while the court reporter located and transcribed the grand jury minutes.

The Supreme Court found the trial court erred in refusing disclosure under Rule 26.2 of the Rules of Criminal Procedure relating to production of statements of witnesses.

Syl. pt. 3 - The term "statement" is defined in Rule 26.2(f) of the West Virginia Rules of Criminal Procedure and includes "a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to grand jury.

Syl. pt. 4 - Even thought the grand jury proceedings which involve a witness's statement have not been typed, this does not exempt the statement from the requirements of Rule 26.2 of the West Virginia Rules of Criminal Procedure.

Syl. pt. 5 - Under the "in the possession of " language of Rule 26.2(f) of the West Virginia Rules of Criminal Procedure, a prosecutor is required to disclose statements to which he has access even though he does not present physical possession of the statement.

DISCOVERY

Right to statements of prosecution witnesses (continued)

State v. Watson, (continued)

The Supreme Court noted under the literal reading of the rule, defense counsel could not request the information until the witness testified. The Court, however, urged parties to make a voluntary disclosure of Rule 26.2 statements.

The Court found, procedurally, once the request is made, a trial court is to determine if a "statement" exists, if it is in the possession of the party, and if it relates to the subject matter to which the witness has testified. The Court noted the rule allows a trial court to exercise portions of a statement that do not relate to the subject matter. Those portions excised are to be preserved for purposes of appeal.

Statement introduced in rebuttal

State v. Samples, 328 S.E.2d 191 (1985) (Brotherton, J.)

Appellant was convicted of first degree murder with no recommendation of mercy. When the appellant returned home the day of the murders, he was immediately arrested and read the *Miranda* rights. Appellant gave a full confession to killing his step-brother and his step-brother's wife. The appellant also confessed to shooting Rick Arbogast two or three months earlier. Two attorneys were appointed to represent him. Appellant was admitted to Weston State Hospital for psychiatric testing and then returned to the county jail. Shortly after his return to jail, a Trooper interviewed him about his claim of shooting Rick Arbogast. Appellant's attorneys were not notified of his interview and appellant was not read his *Miranda* rights. Appellant told the trooper that he was putting on an act for the doctors at Weston and that he was not crazy.

Appellant contends the State should have disclosed the second interview to the defense.

DISCOVERY

Statement introduced in rebuttal (continued)

State v. Samples, (continued)

Syl. pt. 2 - When the trial court enters a pretrial discovery order requiring the prosecution to disclose evidence in its possession, nondisclosure by the prosecution is fatal to the State's case where such nondisclosure is prejudicial. *State v. Grimm*, 270 S.E.2d 173, 178 (W.Va. 1980).

The Court found a statement that the appellant was putting on an act and that he was not really crazy was as damaging as any conceivable admission. The Court found the surprise use of the report prejudiced the appellant's preparation for trial and constitutes reversible error.

Warrant

State v. Sheppard, 310 S.E.2d 173 (1983) (McGraw, C.J.)

See DISCOVERY Indictment, (p. 116) for discussion of topic.

Work product

State v. Clements, 334 S.E.2d 600 (1985) (Brotherton, J.)

See DISCOVERY Confidential information, (p. 109) for discussion of topic.

DISMISSAL OF CHARGES

In general

Myers v. Frazier, 319 S.E.2d 782 (1984) (Miller, J.)

See PLEA BARGAINING In general, (p. 398) for discussion of topic.

DOUBLE JEOPARDY

In general

State v. Pancake, 296 S.E.2d 37 (1982) (Harshbarger, J.)

Double jeopardy laws, federal or state, "can hardly be characterized as models of consistency and clarity." One of the problems is that they embrace three distinct, separate kinds of double jeopardy; several prosecutions for the same offense; interrupted trials; and multiple punishments for the same offense. Various tests have developed for each one of those three categories.

State v. Williams, 305 S.E.2d 251 (1983) (McGraw, J.)

See DOUBLE JEOPARDY Same offense, (p. 133) for discussion of topic.

Abduction/sexual assault

State v. Trial, 328 S.E.2d 671 (1985) (Brotherton, J.)

Appellant was convicted of abduction, malicious assault and second degree sexual assault. He contends his punishment for both abduction and sexual assault constitutes multiple punishments for the same offense in violation of the double jeopardy clause. Applying the *Blockburger* test, the Supreme Court found the convictions for abduction and sexual assault each required proof of a separate fact. The Court found abduction of a female with intent to defile, *W.Va. Code* § 61-2-14 (1977) required an apportion or taking away that is not an element of sexual assault; and that sexual assault in the second degree, *W.Va. Code* § 61-8B-4 (1977), required sexual intercourse or penetration that was not an element of abduction.

The Court found on the facts of this case, the abduction was incidental to the sexual assault and that although the conviction may arguable have arisen from the "same transaction," they do not constitute the same offense for purpose of double jeopardy.

DOUBLE JEOPARDY

Controlled substances

State v. Zaccagnini, 308 S.E.2d 131 (1983) (Miller, J.)

Defendant was convicted of and sentenced to consecutive terms for delivery of LSD; possession of LSD with intent to deliver and possession of cocaine with intent to deliver. He contended that the two counts relating to possession with intent to deliver were one transaction under syl. pt. 3, *State v. Barnett*, "Delivery of two controlled substances at the same time and place to the same person is one offense under our double jeopardy clause . . . " The Supreme Court found *Barnett* to be factually distinguishable. In *Barnett* the defendant was convicted of delivery of two substances, neither of which was a narcotic, and the penalty for the delivery of each was the same.

The Supreme Court found that our Uniform Controlled Substance Act rates various drugs by their dangerousness and provides for different levels of punishments. Drug dealing in narcotics receives the highest penalty under Code 60A-4-401 (a) (i). Here, defendant's cocaine conviction involved a "narcotic drug."

Defendant's conviction of possession with intent to deliver LSD did not involve a "narcotic drug." Thus, the Court noted that the convictions for possession with intent to deliver involved two separate drugs whose punishments carried two separate penalties.

Syl. pt. 8 - Where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not.

The Supreme Court concluded that possession with intent to deliver a narcotic drug is a separate and distinct offense from that of possession with intent to deliver another prohibited substance because there is embodied in the definitional provision: "a controlled substance . . . which is a narcotic drug." The Court found this a different and distinct element of proof and this offense carries a different penalty than the other controlled substance penalties. In order to convict for this crime as distinguished from other controlled substance violations, it is necessary to prove that it is a narcotic substance under *W.Va. Code* 60A-1-101 (p). The court concluded double jeopardy principles were not violated.

DOUBLE JEOPARDY

Homicide

State v. Flint, 301 S.E.2d 765 (1983) (McHugh, J.)

The appellant alleged that the trial court erred in not granting his motion to dismiss the charge of murder because both murders arose from a single transaction. The facts indicated that the appellant took, at gunpoint, a sum of money from Otis Kinder, the owner of the grocery store, and then fatally shot Kinder. He then encountered Lloyd Smith on the parking lot and shot Smith and took his car. The appellant was tried and convicted at separate trials for the two murders.

Applying the standard set forth in syl. pt. 2, *State ex rel. Watson v. Ferguson*, 274 S.E.2d 440 (W.Va. 1980), the Supreme Court found that there was "no contention that the multiple homicides occurred as a result of a single volitive act on the part of the [appellant]" who moved from one victim to the other. The assignment of error was found to be without merit.

State v. Clayton, 317 S.E.2d 499 (1984) (Harshbarger, J.)

See HOMICIDE Instructions, Retrial, (p. 231) for discussion of topic.

Felony-murder

State v. Williams, 305 S.E.2d 251 (1983) (McGraw, J.)

See DOUBLE JEOPARDY Same offense, (p. 133) for discussion of topic.

Retrial

State v. Young, 311 S.E.2d 118 (1983) (McGraw, J.)

See DOUBLE JEOPARDY Retrial, (p. 131) for discussion of topic.

DOUBLE JEOPARDY

Incest

State v. Peyatt, 315 S.E.2d 574 (1983) (McHugh, J.)

See DOUBLE JEOPARDY Sexual assault, (p. 136) for discussion of topic.

Larceny

State v. Hall, 298 S.E.2d 246 (1982) (McHugh, J.)

See RECEIVING STOLEN GOODS Sufficiency of evidence, (p. 440) for discussion of topic.

State v. Oldaker, 304 S.E.2d 843 (1983) (Harshbarger, J.)

See RECEIVING STOLEN GOODS Elements of the offense, (p. 440) for discussion of topic.

Lesser included offense

State v. Williams, 305 S.E.2d 251 (1983) (McGraw, J.)

See DOUBLE JEOPARDY Same offense, (p. 133) for discussion of topic.

Mistrial

Prosecutorial misconduct

State v. Clements, 334 S.E.2d 600 (1985) (Brotherton, J.)

Appellant was convicted of one count of first degree murder and one count of voluntary manslaughter. The appellant was first tried in Ohio County and found guilty of two counts of murder and two counts of kidnaping. The verdict was overturned by the trial court because of improper conduct of the Ohio County Sheriff's Department. On appeal, appellant contends he should not have been deemed to have waived his protection against double jeopardy

DOUBLE JEOPARDY

Mistrial (continued)

Prosecutorial misconduct (continued)

State v. Clements, (continued)

by moving for a new trial because the motion was coerced by prosecutorial misconduct. The Supreme Court found the actions of the Sheriff's Department in this case were not the actions of the prosecutor or the court and therefore the defendant does not qualify for this exception.

Syl. pt. 1 - Unless the defendant can show that the prosecutor or the court was guilty of overreaching, a defendant's request for a mistrial removes any barrier to reprosecution. Syl. pt. 1, *State ex rel. Betts v. Scott*, 267 S.E.2d 173 (W.Va. 1980).

Parole

Adams v. Circuit Court of Randolph County, 317 S.E.2d 808 (1984) (Miller, J.)

See PAROLE Discretion of parole board, (p. 393) for discussion of topic.

Plea bargaining

Myers v. Frazier, 319 S.E.2d 782 (1984) (Miller, J.)

See PLEA BARGAINING In general, (p. 398) for discussion of topic.

Receiving stolen goods

State v. Hall, 298 S.E.2d 246 (1982) (McHugh, J.)

See RECEIVING STOLEN GOODS Sufficiency of evidence, (p. 440) for discussion of topic.

DOUBLE JEOPARDY

Receiving stolen goods (continued)

State v. Oldaker, 304 S.E.2d 843 (1983) (Harshbarger, J.)

See RECEIVING STOLEN GOODS Elements of the offense, (p. 440) for discussion of topic.

Retrial

State v. Young, 311 S.E.2d 118 (1983) (McGraw, J.)

Appellant was convicted of second degree murder and sentenced to five to eighteen years. A writ of habeas corpus was granted by the U.S. District Court for the Northern District of W.Va. The court stayed execution of the writ for ninety days to permit the State to retry appellant. On retrial, appellant was found guilty of murder in the first degree with no recommendation of mercy. Appellant was sentenced to confinement for life.

On appeal, the appellant protested the imposition of a harsher sentence upon retrial than that imposed pursuant to his original conviction.

Syl. pt. 1 - Upon retrial of a criminal defendant, who has previously been convicted of second degree murder under a general homicide indictment, the court may not impose judgement for a more serious degree of homicide than that imposed at the original trial.

The Supreme Court found that *Chaffin v. Stynchombe*, 412 U.S. 17 (1973) did not control here since the appellant was not reconvicted of the "same offense." In *Chaffin* the defendant was convicted of robbery and sentenced to fifteen years. He was subsequently granted habeas corpus relief. After retrial, he was reconvicted of robbery and sentenced to life. The U.S. Supreme Court found that a harsher sentence on reconviction for the same offense does not violate double jeopardy, there was no danger of vindictiveness since the jury was not informed of the defendant's prior sentence, and the possible chilling effect occasioned by the possibility of a harsher sentence did not place an impermissible burden on the right of a criminal defendant to appeal or collaterally attack his conviction.

DOUBLE JEOPARDY

Retrial (continued)

State v. Clayton, 317 S.E.2d 499 (1984) (Harshbarger, J.)

See HOMICIDE Instructions, Retrial, (p. 231) for discussion of topic.

Robbery

State ex rel. Lehman v. Strickler, 329 S.E.2d 882 (1985) (Miller, J.)

Appellant took Kip Dooley's and Harry Neal's motorcycle vests with gang patches at gunpoint. He then shot both men, killing Dooley and seriously injuring Neal. He was convicted of aggravated robbery of Neal, malicious wounding of Neal and the felony murder of Dooley. He contends double jeopardy prohibits his conviction and sentencing for both felony murder and the underlying felony of aggravated robbery. The double jeopardy issue is: In forcibly taking the motorcycle vests of Kip Dooley and Harry Neal, did the petitioner commit one aggravated robbery or two?

When a defendant commits two separate aggravated robberies, and in the course thereof kills one of the victims, he can be convicted of both the aggravated robbery of one victim and the felony murder of the other.

Same offense

State v. Pancake, 296 S.E.2d 37 (1982) (Harshbarger, J.)

The Fifth Amendment multiple punishments analysis prohibits a court from subjecting a defendant to double punishment for one legislatively defined offense or from punishing for both greater and lesser-included offenses.

Federal double jeopardy multiple punishment rules are not overtly offended by sentences for both rape and burglary.

A "legislature remains free under the Double Jeopardy Clause to define crimes and fix punishments; but once the legislature has acted courts may not impose more than one punishment for the same offense . . ." *Brown v. Ohio*, 432 U.S. 161, 97 S.C. 2221, 53 L.E.2d 187 (1977).

DOUBLE JEOPARDY

Same offense (continued)

State v. Pancake, (continued)

Applying the same evidence test, the Supreme Court found that proving each crime committed by the defendant required proof of facts that the other did not.

The Supreme Court found that since the crimes of sexual assault and burglary each required proof of separate facts, the defendant's double jeopardy protections were not violated by two convictions and two sentences.

State v. Williams, 305 S.E.2d 251 (1983) (McGraw, J.)

Appellant was convicted of murder, arson and robbery. He alleged that since his first degree murder conviction was a conviction for felony murder, the arson and robbery conviction were lesser included offenses and double jeopardy prohibited this conviction and sentencing of the lesser charges.

The double jeopardy clause of our federal and state constitutions protect an accused in a criminal proceeding from multiple prosecutions and multiple punishments for the same offense. This protection has been held to prohibit serial prosecutions and the imposition of separate punishments for both a greater and a lesser included offense arising out of a single criminal act or transaction. In *State ex rel. Hall v. Strickler*, 285 S.E.2d 143 (W.Va. 1981) it was held that where a defendant had been convicted of felony-murder, double jeopardy would prohibit a second trial of the defendant on the underlying felony of robbery.

The Court noted the determination of whether a person is being tried for or has been convicted of both a greater and a lesser included offense does not necessarily turn on whether he is charged with violating more than one criminal statute.

DOUBLE JEOPARDY

Same offense (continued)

State v. Williams, (continued)

"Since many statutory crimes are duplicative, it is well established that separate statutory crimes may be the 'same offense' under the double jeopardy clause, even though they are not identical in either constituent elements or actual proof. (citation omitted)." *State v. Reed*, 276 S.E.2d 313 (W.Va. 1981). In the absence of any expression of legislative intent on the issue, the test of whether violations of separate statutory provisions arising out of one criminal episode constitute the "same offense" for double jeopardy purposes is the "same evidence" test.

"The applicable rule is that where the same act or transaction constitutes a violation of two distinct provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of a fact which the other does not." *State v. Pancake*, *supra* at 42, quoting *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.C. 180, 182, 76 L.E. 306, 309 (1932).

The Supreme Court found that when they applied the same evidence test to the statutes applicable in this case, it was clear that robbery or arson upon which a felony-murder case is based constitutes a lesser included offense. Consequently they held:

Syl. pt. 8 - Double jeopardy prohibits an accused charged with felony-murder, as defined by *W.Va. Code* § 61-2-1 (1977) (Replacement Vol.), from being separately tried or punished for both murder and the underlying enumerated felony.

Footnote 10 - The State asserted that since *Hall* was not decided until several months after the appellant's trial and sentencing, it could not be applied to vacate the arson and robbery sentences imposed by the trial court. The Court noted only that the United States Supreme Court reached the same conclusion in its Fifth Amendment analysis in *Harris v. Oklahoma* and *Brown v. Ohio*, in 1977, which was binding on the states through the Fourteenth Amendment.

DOUBLE JEOPARDY

Same offense (continued)

State v. Williams, (continued)

The Court found it followed from their holding that the imposition of punishment for the lesser included offense of the felony-murder in this case was unconstitutional. However, since the jury was instructed that it might return a guilty verdict on the murder charge upon a finding that the appellant participated in the commission of either the robbery or the arson, it was impossible for them to determine which of the two charges the jury found to be the underlying felony. To secure the protections afforded the appellant by the double jeopardy laws, the Court reversed the sentences for both the arson and robbery convictions and remanded the case for resentencing.

The appellant alleged the trial court's refusal to instruct the jury to find him not guilty of arson and robbery violated the guarantee against double jeopardy. The Supreme Court found this assertion was not well taken.

Since the question of the appellant's participation of one or both of those crimes was an essential element to the State's felony-murder case, it was properly submitted to the jury. Consequently, the Supreme Court found no double jeopardy error which would warrant reversal of his conviction and the award of a new trial.

The Court concluded there was no error at trial which would warrant reversal of the appellant's convictions. They were of the opinion however, that the appellant was unconstitutionally sentenced to terms of imprisonment for arson and robbery. When there is no error in a criminal case other than the judgement imposing sentence, the judgement should be reversed and remanded for entry of a proper sentence by the trial court. *State v. Fairchild*, 298 S.E.2d 110 (W.Va. 1982); *State ex rel. Nicholson v. Boles*, 148 W.Va. 229, 134 S.E.2d 576 (1964); *State ex rel. Mounts v. Boles*, 147 W.Va. 152, 126 S.E.2d 393, *cert denied*, 371 U.S. 930, 83 S.C. 298, 9 L.E.2d 235 (1962).

State v. Zaccagnini, 308 S.E.2d 131 (1983) (Miller, J.)

See DOUBLE JEOPARDY Controlled substance, (p. 127) for discussion of topic.

DOUBLE JEOPARDY

Same offense (continued)

State v. Peyatt, 315 S.E.2d 574 (1983) (McHugh, J.)

See DOUBLE JEOPARDY Sexual assault, (p. 136) for discussion of topic.

Brandishing a weapon and carrying a weapon without a license

Cline v. Murensky, 322 S.E.2d 702 (1984) (McHugh, C.J.)

An altercation took place at a nightclub owned by the petitioners. The petitioners entered pleas of guilty at 4 a.m. in magistrate court to brandishing a weapon. The prosecutor was not present at this hearing. The petitioners were later indicted by misdemeanor indictments for carrying a weapon without a license. The parties in this proceeding agree that the charges of brandishing a weapon and carrying a weapon without a license arose from the same criminal transaction.

Syl. pt. 3 - The statutory offense of brandishing a weapon, *W.Va. Code*, 61-7-10 [1925], and carrying a weapon without a license, W.Va. Code, 61-7-1 [1975], even when arising form a single criminal transaction, do not constitute the "same offense" under constitutional prohibitions against double jeopardy.

Sexual assault

State v. Peyatt, 315 S.E.2d 574 (1983) (McHugh, J.)

The appellant was convicted of incest, first degree sexual assault and third degree sexual assault. The indictment was based upon the allegations of the appellant's daughter who claimed the appellant had frequently engaged in sexual intercourse with her of the time of her fourth birthday until she was approximately twelve.

DOUBLE JEOPARDY

Sexual assault (continued)

State v. Peyatt, (continued)

On appeal, the appellant contended the trial court erred when it refused to dismiss the indictment or require the prosecution to elect between the sexual assault charges and the incest charges. He contended that separate indictments, convictions and sentences for violating our incest statute and sexual assault statutes, when such conviction arise out of the same act, infringe upon his rights under the double jeopardy clauses of the U.S. and W.Va. Constitutions.

To determine whether the same act or transaction constitutes a violation of two distinct statutory provisions, the Supreme Court applied syl. pt. 8, *State v. Zaccagnini*, 308 S.E.2d 131 (W.Va. 1983) found in DOUBLE JEOPARDY Controlled substances (p. 127). This quotes *Blockburger v. United States*, 284 U.S. 299 (1932).

The Supreme Court found in W.Va., a conviction for first degree sexual assault includes sexual intercourse by an offender fourteen years of age or older with a person who is incapable of consent because he is less than eleven or physically helpless and sexual intercourse obtained by "forcible compulsion". Code 61-8B-3. A conviction for third degree sexual assault may be obtained by proving "sexual intercourse with another person who is incapable of consent because he is mentally defective or mentally incapacitated . . ." or sexual intercourse by a person sixteen or older with a person who is "incapable of consent because he is less than sixteen . . .[and] . . .at least four years younger than the defendant." Code 61-8B-5.

The Supreme Court found it is clear that convictions under the sexual assault statutes and the incest statute require proof of different elements and are, therefore not the same offense under *Blockburger*. The Court found in the case of first and third degree sexual assaults, convictions may be obtained by proving sexual intercourse without consent by reason of force, age or physical or mental infirmity. However, convictions for incest may be achieved by proving sexual intercourse between the proscribed relationships. Consent or lack thereof is not an element of incest. The Court concluded separate convictions of sexual assaults and the incest, although they arise from the same act, do not constitute the same offense for purpose of the double jeopardy clauses.

DOUBLE JEOPARDY

Sufficiency of evidence

State v. Lucas, 299 S.E.2d 21 (1982) (Per Curiam)

Applies standards set forth in Syl. pt. 5, *State v. Frazier*, 162 W.Va. 602, 252 S.E.2d 39 (1979). (Found in Vol. I under this topic.)

In this case, The Supreme Court found that the admission into evidence of the juvenile fingerprint card appellant constituted reversible error. The Court could not say that the State would be unable to prove its case without the fingerprint evidence, therefore, the Court would not foreclose the possibility of a retrial.

Uniform securities act violations

State v. Fairchild, 298 S.E.2d 110 (1982) (McGraw, J.)

See UNIFORM SECURITIES ACT VIOLATIONS Double jeopardy, (p. 570) for discussion of topic.

DRUNK DRIVING

Administrative sanctions

NOTE: Since administrative suspension or revocation of a driver's license is not a proceeding in which court appointed counsel is required, this section of the index (DRUNK DRIVING Administrative sanctions) will no longer be updated.

Blood alcohol tests

Consent

State v. Franklin, 327 S.E.2d 449 (1985) (Neely, J.)

Appellant was convicted of driving under the influence of alcohol, resulting in death. Following the accident, Trooper Jones investigated the scene after both the victim and the appellant had been transported to the hospital. Trooper Jones radioed Trooper Macher and informed him of the accident. Trooper Macher went to the hospital and immediately found the appellant. The trooper testified that he had reasonable grounds to believe the appellant was driving under the influence of alcohol because the appellant's skin was flushed, because he mumbled and slurred his speech, because the appellant was "mush-mouthed", and because the trooper detected a moderate odor of alcohol on the appellant's breath. The trooper read appellant his rights which appellant acknowledged by signing a form but noted that he did not wish to speak to the trooper until he was advised by a lawyer. The trooper then got a blood-testing kit from his cruiser. The appellant signed a consent form to permit venapuncture and a technician extracted his blood. The sample was tested by a chemist and appellant was determined to be legally drunk.

Appellant admits he signed the consent form for blood to be withdrawn, but argues that his request for a lawyer moments before negates any suggestion that his consent was "knowing and voluntary". The Court found the appellant, by his words and conduct, voluntarily consented to the administration of the test. The Court found the appellant's implication that his Fifth Amendment right to remain silent was somehow infringed upon by the removal of blood from his veins was unfounded since they have never found the privilege against self-incrimination applicable where the evidence obtained from the accused is not of a testimonial or communicative nature.

DRUNK DRIVING

Blood alcohol tests (continued)

Foundation for admission into evidence

State v. Franklin, 327 S.E.2d 449 (1985) (Neely, C.J.)

Appellant was convicted of driving under the influence of alcohol, resulting in death. Appellant contends the state failed to comply with the requirements of *W.Va. Code* 17C-5-8 (1981) that a blood alcohol test "must be performed in accordance with methods and standards approved by the state department of health". The Supreme Court found the four standards set forth in *State v. Hood,* 155 W.Va. 377, 184 S.E.2d 334 (1971) are useful in determining whether the necessary foundation was established for the admission of actual blood tests. Those standards are:

> (1) That the testing device or equipment was in proper working order; (2) that the person giving and interpreting the test was properly qualified; (3) that the test was properly conducted; and (4) that there was compliance with any statutory requirements. 155 W.Va. at 342, 184 S.E.2d at 337.

The Court found the chemist for the state in this case testified that his testing device was in proper working order, that he was properly qualified, that the test was properly conducted, and that his method of examination was recognized by the Department of Health as one of the suitable and acceptable methods. The Court found the chemist was a knowledgeable and highly competent chemist despite his inability to quote verbatim from the health department regulations.

Denial of a fair trial

Presence and activities of MADD members

State v. Franklin, 327 S.E.2d 449 (1985) (Neely, J.)

Syl. pt. 2 - Where the defendant was on trial for a felony under *W.Va. Code* 17C-5-2 [1981], the obvious presence of members of an organization

Denial of a fair trial (continued)

Presence and activities of MADD members (continued)

State v. Franklin, (continued)

dedicated to stiffer penalties for drunk drivers who advertised their association with that organization by wearing badges was reversible error.

In this case, ten to thirty MADD demonstrators remained in court throughout the trial and sat directly in front of the jury. Some cradled sleeping infants and all prominently displayed their MADD buttons. One woman who had been summoned for jury duty appeared at the bar of the court wearing a "MADD" button and explained that as she entered the courthouse, the sheriff handed her the button and told her where to sit. The trial court excused her from jury duty and the sheriff was censured. The sheriff and other adherents of MADD remained highly visible throughout the trial other than excusing two individuals from sitting on the jury, the court refused to take any other action against the MADD presence.

The Supreme Court was concerned that the right of public access to a criminal trial be coordinated with the constitutional right of a defendant to a fair trial. The Court found it is important to insure that the jury is always insulated at the best of the trial court's ability from every source of pressure or prejudice.

The Court found the holding in *State v. Richey*, 298 S.E.2d 879 (W.Va. 1982) is inapplicable to this case since here the spectators were clearly distinguishable from other visitors in the courtroom and, led by the sheriff, they constituted a formidable, even though passive, influence on the jury. The Court found the trial court erred in taking no action against the group. The Court found the mere presence of the spectators wearing MADD buttons and the pressure and activities of the uniformed sheriff leading them constituted reversible error.

DRUNK DRIVING

Probation as a sentencing alternative

State ex rel. Simpkins v. Harvey, 305 S.E.2d 268 (1983) (McGraw, J.)

The petitioner was indicted for driving under the influence of alcohol and causing the death of another person in violation of Code 17C-5-2(a). Prior to entering his guilty plea to the charge, petitioner requested a presentence investigation report be prepared to aid the court in deciding whether petitioner should be released on probation or confined in a youthful male offender center. The Court denied the request, reasoning that Code 17-5-2 provides for a mandatory penitentiary sentence and that a presentence investigation would therefore serve no purpose.

The Supreme Court found that probation and treatment as a youthful male offender are valid sentencing alternatives for one convicted of an offense proscribed by *W.Va. Code* 17C-5-2. However, they denied the writ because they found the petitioner was not entitled to the specific relief which he sought in the mandamus proceeding.

See GUILTY PLEAS Pre-sentence investigation prior to entry of plea, (p. 209) for discussion of topic.

The Supreme Court found the issues in this case involve the interrelationship of our probation statutes, the Youthful Male Offender Act, and our statute prescribing the penalties for driving under the influence of alcohol.

The W.Va. probation statutes provide generally that any person convicted of a felony, the maximum penalty for which is less than life imprisonment, shall be eligible for probation, provided they have not been convicted of a felony within the preceding five years. The Supreme Court had held that in the past that unless a clear statutory exception applies, this legislative grant of power places the matter of probation within the sound discretion of the trial court. *State v. Wotring*, 279 S.E.2d 182 (W.Va. 1982); *State ex rel. Winter v. McQueen*, 239 S.E.2d 660 (W.Va. 1972). Release on probation is subject to express statutory conditions, as well as reasonable conditions imposed by the trial court. *See W.Va. Code* § 62-12-11 (1977 Replacement Vol.); *Louk v. Haynes*, 223 S.E.2d 780 (W.Va. 1976), which may be imposed for a maximum period of five years. *W.Va. Code* § 62-12-11 (1977 Replacement Vol.)

Probation as a sentencing alternative (continued)

State ex rel. Simpkins v. Harvey, (continued)

The Youthful Male Offender Act, W.Va. § 25-4-1 *et seq*., grants to the trial court the power to suspend the sentence of any male youth between the ages of 16 and 21 who have been convicted of a criminal offense, other than an offense punishable by life imprisonment, and to confine him in a youthful male offender center for treatment. W.Va. § 25-4-6. Upon completion of the treatment program, or upon a determination that he is unfit for treatment, the offender is returned to the sentencing court for probation or resentencing. *Id.*

The Act and our probation statutes are to be read and considered together in determining their scope and effect. *State v. Reel*, 152 W.Va. 646, 165 S.E.2d 813 (1969).

The pertinent language of *W.Va. Code* § 17C-5-2 provides: "The sentences provided herein upon conviction of violation of this article are mandatory and shall not be subject to suspension or probation, except that the court may provide for community confinements." *W.Va. Code* § 17C-5-2(1). This statutory language was enacted into law in 1981. *See* 1981 W.Va. Acts ch.

The Supreme Court found that while they recognize that a general statutory enactment must yield to a specific statutory enactment where the statutes relate to the same subject and cannot be reconciled, *see, e.g., State ex rel. Sahley v. Thompson*, 151 W.Va. 336, 151 S.E.2d 870 (1966); *see* also *State ex rel. Myers v. Woods*, 154 W.Va. 431, 175 S.E.2d 637 (1970), they found no conflict in the statutes which requires application of this principle.

The cardinal rule in the construction of statutes is to ascertain and give effect to the intention of the Legislature. *Vest v. Cobb*, 138 W.Va. 660, 76 S.E.2d 885 (1953); *Pond Creek Pocahontas Co. v. Alexander*, 137 W.Va. 864, 74 S.E.2d 590 (1953). Primarily, such intent must be determined form the language of the statute, *see Spencer v. Yerace*, 155 W.Va. 54, 180 S.E.2d 868 (1971); *State v. General Daniel Morgan Post No. 548, Veterans of Foreign Wars*, 144 W.Va. 137, 107 S.E.2d 353 (1959), and where the statute is clear and ambiguous the legislative intent is plain, it is the duty of the court to apply the statute, and not to construe it. *See Cummins v. State Worker's Compensation Comm'r*, 152 W.Va. 781, 166 S.E.2d 562 (1969); *State v. Bragg*, 152 W.Va. 372, 163 S.E.2d 685 (1968). Where, however, the

Probation as a sentencing alternative (continued)

State ex rel. Simpkins v. Harvey, (continued)

language used is ambiguous, the court, in ascertaining the legislative intent, should consider the subject matter of the legislation, its purposes, objects and effects in addition to its express terms. *See*, *e.g.*, *State ex rel. Holbert v. Robinson*, 134 W.Va. 524, 59 S.E.2d 884 (1950).

Turning to the language of *W.Va. Code* § 17C-5-2, the Supreme Court noted that subsection (1), in its first clause, provides that the sentences provided for a violation of any offense under article 5 of chapter 17C "are mandatory and shall not be subject to suspension or probation . . ." However, the next clause of subsection (1) expressly provides and exception to this rule: "[E]xcept that the court may provide for community service, or work release alternatives, or weekends or part-time confinements." The Court found that the effects of this language is to remove the enumerated alternatives from the operation of the preceding clause, thus limiting the mandatory language of subsection (1). See generally *Sutherland Statutory Construction* §§ 20.22; 47.11 (1972). The Supreme Court had held in the past that where such an exception occurs in a penal statute, the statute as a whole must be construed by application of the rule of strict construction to the penal clause. *State v. Cunningham*, 90 W.Va. 806, 111 S.E.2d 835 (1922).

Further support for the application of this rule of construction to *W.Va. Code* § 17C-5-2 can be found in more recent pronouncements that "[p]enal statutes must be strictly construed against the State and in favor of the defendant." Syl. pt. 2, *State v. Ball*, 264 S.E.2d 844 (W.Va. 1980), and by the rule that statutes dealing with probation are remedial in nature and subject to a construction in favor of the defendant. *See State v. Wotring*, *supra*; *State ex rel. Handley v. Hey*, 255 S.E.2d 354 (W.Va. 1979). Applying these principles to the language of *W.Va. Code* § 17C-5-2(1), the Supreme Court concluded that when one or more of the specific sentencing alternatives are imposed, the mandatory language contained in the first clause of subsection (1) of *W.Va. Code* § 17C-5-2, which precluded suspension or probation is inapplicable

Probation as a sentencing alternative (continued)

State ex rel. Simpkins v. Harvey, (continued)

The Supreme Court held that suspension of sentence and release on probation is an authorized sentencing alternative for a violation of Code 17C-5-2, provided that the statutory conditions attendant to probationary release are met and that probation is imposed concomitantly with community service, work release, or weekend or part-time confinement.

The Court also concluded that a person convicted of an offense proscribed by Code 17C-5-2, if otherwise eligible, may be imprisoned in a youthful male offender center for purposes of treatment pursuant to Code 25-4-6.

State v. Franklin, 327 S.E.2d 449 (1985) (Neely, J.)

Appellant was convicted of driving under the influence of alcohol, resulting in death and was sentenced to 1-3 years. On appeal, he contends it was reversible error for the circuit court to have sentenced him to 1-3 years without the possibility of probation. The Supreme Court found the holding in *State ex rel. Simpkins v. Harvey*, 305 S.E.2d 268 (W.Va. 1983) applies to this case:

> . . . that suspension of sentence and release on probation is an authorized sentencing alternative for a violation of *W.Va. Code* § 17C-5-2, provided that the statutory conditions attendant to probationary release are met, see *W.Va. Code* § 62-12-19 and that probation is imposed concomitantly with community service, work release, or weekend or part-time confinement. Any other interpretation of the language used by the Legislature would render meaningless the sentencing alternatives expressly authorized by *W.Va. Code* § 17C-5-2 and frustrate the rehabilitative purposes of our penal system. [Footnotes omitted by this Court.] 305 S.E.2d at 276.

DRUNK DRIVING

Prohibition of second offense drunk driving

Ash v. Twyman, 324 S.E.2d 138 (1984) (McHugh, J.)

See PROHIBITION Standard of relief, (p. 423) for discussion of topic.

Reduction of offense

State v. Gainer, 318 S.E.2d 456 (1984) (McGraw, J.)

The State appeals the dismissal of its petition for a writ of prohibition in the circuit court which sought to nullify the reduction of a second offense drunk driving charge to a first offense drunk driving charge by a magistrate.

The Supreme Court found if the circuit court had applied the proper test (See MANDAMUS Duty to issue rule to show cause, (p. 377)) it would have determined that a *prima facie* case had been made and that a rule to show cause against the magistrate should issue. The case was remanded.

Warrantless arrest at hospital

State v. Franklin, 327 S.E.2d 449 (1985) (Neely, C.J.)

Appellant was convicted of driving under the influence of alcohol, resulting in death. Following the accident, Trooper Jones investigated the scene after both the victim and the appellant had been transported to the hospital. Trooper Jones radioed Trooper Macher and informed him of the accident. Trooper Macher went to the hospital and immediately found the appellant. The trooper testified he had reasonable grounds to believe the appellant was driving under the influence of alcohol because the appellant's skin was flushed, because he mumbled and slurred his speech, because the appellant was "mush-mouthed", and because the trooper detected a moderate odor of alcohol on the appellant's breath. The trooper read appellant his rights and then got a blood-testing kit from his cruiser. The appellant signed a consent form to permit venapuncture and a technician extracted his blood. The sample was tested by a chemist and appellant was determined to be legally drunk.

Warrantless arrest at hospital (continued)

State v. Franklin, (continued)

Appellant contends the warrantless arrest was illegal.

Syl. pt. 1 - Since the offense of driving under the influence of alcohol resulting in death under *W.Va. Code*, 17C-5-2 [1981] may be, depending on the circumstance, either a felony or misdemeanor, a lawful, warrantless arrest may be made, upon reasonable suspicion of probable cause, at a hospital by an officer before whom the offense was *not* committed if the suspect has been taken to the hospital from the scene of the accident for emergency medical care.

DUE PROCESS

Contempt

See CONTEMPT Due process, (p. 65) for discussion of topic.

Conviction on *ex parte* statements alone

Naum v. Halbritter, 309 S.E.2d 109 (1983) (Neely, J.)

See EVIDENCE Hearsay-exceptions, Statements against penal interest, (p. 173) for discussion of topic.

Disclosure of confidential informant

State v. Bennett, 304 S.E.2d 28 (1983) (Per Curiam)

See DISCOVERY Informant, (p. 117) for discussion of topic.

Instructions

Presumption of innocence

State v. Pryor, 304 S.E.2d 681 (1983) (Per Curiam)

See PATERNITY Instructions, (p. 396) for discussion of topic.

Juveniles

State ex rel. E.K.C. v. Daughtery, 298 S.E.2d 834 (1982) (Per Curiam)

See JUVENILES Probation, Revocation, (p. 351) for discussion of topic.

Notice of alibi rule

State v. Hall, 304 S.E.2d 43 (1983) (Neely, J.)

See DISCOVERY Notice of alibi, (p. 119) for discussion of topic.

DUE PROCESS

Pre-indictment delay

State ex rel. Bess v. Hey, 301 S.E.2d 580 (1983) (Per Curiam)

See PRE-INDICTMENT DELAY In general, (p. 407) for discussion of topic.

Right to jury trial

Municipal court

Scott v. McGhee, 324 S.E.2d 710 (1984) (Harshbarger, J.)

See MUNICIPAL COURT Right to jury trial, (p. 387) for discussion of topic.

Sentencing

Retrial

State v. Bonham, 317 S.E.2d 501 (1984) (Miller, J.)

See SENTENCING Retrial, (p. 545) for discussion of topic.

Suggestive identification

Tainted in-court identification

State v. Gravely, 299 S.E.2d 375 (1982) (McHugh, J.)

See IDENTIFICATION Suggestive identification, Tainted in-court identification (p. 255) for discussion of topic.

EMBEZZLEMENT

Elements of the offense

State v. Houdeyshell, 329 S.E.2d 53 (1985) (Per Curiam)

The Court noted it set out the necessary elements to prove embezzlement in *State v. Frasher*, 265 S.E.2d 43 at 46 (W.Va. 1980), quoting from *State v. Moyer*, 52 S.E. 30 (W.Va. 1905):

> '[I]n order to constitute the crime of embezzlement, it is necessary to show, (1) the trust relation of the person charged, and that he falls within the class of persons named; (2) that the property or thing to have been embezzled or converted is such property as in embraced in the statute; (3) that is the property of another person; (4) that it came into the possession, or was placed in the care, of the accused, under and by virtue of his office, place or employment; (5) that his manner of dealing with or disposing of the property, constituted a fraudulent conversion and an appropriation of the same to his own use, and (6) that the conversion of the property to his own use was with the intent to deprive the owner thereof.'

See LARCENY Sufficiency of the evidence, Lawful possession of the property, (p. 368) for discussion of topic.

EMPLOYMENT OF OUTSIDE RESIDENTS TO PERFORM POLICE WORK

W.Va. Code §61-6-11

State v. Maxwell, 328 S.E.2d 506 (1985) (Brotherton, J.)

Two U.S. Navy agents were conducting an investigation of drugs being sold to navy personnel. As part of the investigation, they obtained information that a tavern in W.Va., operated by the appellant was in the business of selling drugs. The Navy agents met with officers of the W.Va. State Police and requested their assistance in coordinating the investigation and arrest of non-navy personnel. One of the navy agents went to the tavern and asked appellant where he could get drugs. The appellant told him he was expecting a shipment that evening. Both of the Navy agents returned that evening and the appellant sold them marijuana. Later that day, a state trooper attempted to buy marijuana from the appellant. The appellant told him he was out but would have some the next day. The appellant introduced two state troopers to a Eugene Riggleman the next day, who sold one of the troopers marijuana. The state police and the county sheriff's department conducted a joint search of the tavern pursuant to a search warrant and found marijuana.

The appellant contends the police violated *W.Va Code* § 61-6-11 by coordinating their activities with U.S. Navy personnel who were not bona fide residents of W.Va.

Syl. pt. 1 - West Virginia Code § 61-6-11 (1984) does not prohibit West Virginia law enforcement officers from coordinating their activities with another law enforcement agency conducting an investigation in West Virginia.

Syl. pt. 2 - Where a Navy internal investigation uncovers illegal conduct by civilians, the Navy agents are not prohibited by 18 U.S.C. § 1385 (1982) from coordinating their activities with West Virginia law enforcement officers or from testifying in the subsequent criminal trial of said civilians.

State v. Presgraves, 328 S.E.2d 699 (1985) (Per Curiam)

Appellant was convicted of drug-related offenses. The sale of drugs was allegedly made to an undercover informer working for the U.S. Navy in connection with an investigation of drugs being sold to Navy personnel. The W.Va. Dept. of Public Safety was notified of the investigation and the cooperation of troopers was requested for the arrest of non-Navy personnel.

EMPLOYMENT OF OUTSIDE RESIDENTS TO PERFORM POLICE WORK

***W.Va. Code* §61-6-11** (continued)

State v. Presgraves, (continued)

The appellant contends the police violated *W.Va. Code* 61-6-11 (1984) by coordinating their activities with U.S. Navy personnel who were not residents of W.Va. The appellant also asserted that the evidence from the investigation was improperly admitted at his trial because the police violated 18 U.S.C. § 1385 (1982), which prohibits the use of the Army or Air Force as a *posse comitatus* or otherwise to execute the laws of the state. The Court applied the standards set forth in syl. Pts. 1 and 2 of *State v. Maxwell*, 328 S.E.2d 506 (W.Va. 1985) cited above.

EQUAL PROTECTION

Imprisonment of female offenders in male youth offender facilities

Flack v. Sizer, 322 S.E.2d 850 (1984) (Harshbarger, J.)

See YOUTHFUL OFFENDERS ACT Imprisonment of female offenders in male youthful offender facilities, (p. 617) for discussion of topic.

Use of peremptory challenges to exclude blacks from jury

State v. Clements, 334 S.E.2d 600 (1985) (Brotherton, J.)

See JURY Challenges, Peremptory, (p. 329) for discussion of topic.

EVIDENCE

In general

State v. Louk, 301 S.E.2d 596 (1983) (Harshbarger, J.)

See EVIDENCE Victim- character and reputation, (p. 198) for discussion of topic.

Abuse of discretion

State v. Ashcraft, 309 S.E.2d 600 (1983) (McGraw, J.)

See EVIDENCE Relevant, Prejudicial, (p. 189) for discussion of topic.

Accomplice

Admissions or confessions

State v. Cochran**,** 310 S.E.2d 476 (1983) (Per Curiam)

See WITNESSES Impeachment, Prior inconsistent statements, (p. 612) for discussion of topic.

Uncorroborated testimony

State v. Hall, 304 S.E.2d 43 (1983) (Neely, J.)

Applies syl. Pts. 1 and 2, *State v. Vance*, 262 S.E.2d 423 (W.Va. 1980). (Found in Vol. I under this topic.)

A cautionary instruction about the inherently suspect nature of an accomplice's testimony was given, thus under *Vance* standards, uncorroborated testimony would sustain appellant's conviction.

EVIDENCE

Admissibility in general

State v. Foster, 300 S.E.2d 291 (1983) (Neely, J.)

See WITNESSES Impeachment, In general, (p. 602) for discussion of topic.

State v. Louk, 301 S.E.2d 596 (1983) (Harshbarger, J.)

"Rulings on the admissibility of evidence are largely within a trial court's sound discretion and should not be disturbed unless there has been an abuse of discretion." *State v. Louk*, 301 S.E.2d 596 (W.Va. 1983).

Adverse spousal testimony

State v. Evans, 310 S.E.2d 877 (1983) (McHugh, J.)

The appellant alleged his former wife was permitted to testify without the appellant's consent in violation of the privilege against adverse spousal testimony. The appellant was convicted of second-degree murder. His former spouse testified, as a witness for the State, that while standing approximately ten to fifteen feet away from the trailer, she heard one shot and the a voice say, "man, why'd you do that?" She recognized the voice as that of the victim.

The Supreme Court found that in 1882, when the legislature first deemed spouses competent to testify against one another, such testimony was only allowed "at the request of the accused." The legislature thereby created a privilege which is currently embodied in *W.Va. Code*, 57-3-3 (1931). The Court found it is clear from the plain language of this code section that the privilege may be invoked by a defendant spouse to prevent the State from calling the other spouse as a witness where the proceeding occurs during the tenure of the marriage. The issue in this case was whether the statutory privilege may be invoked if, at the time of the trial, the defendant and the witness are divorced.

Syl. pt. 5- The privilege against adverse spousal testimony contained in *W.Va. Code*, 57-3-3 (1931) applies only where the parties stand in relation of husband and wife.

EVIDENCE

Adverse spousal testimony (continued)

State v. Evans, (continued)

Accordingly, the Supreme Court found, where the parties have ben divorced, and the martial relationship terminated, the statute is not applicable. The Court concluded there was no error in permitting the appellant's former wife to testify against him.

Age

State v. Richey, 298 S.E.2d 879 (1982) (Miller, J.)

See SEXUAL ASSAULT Evidence of age, (p. 547) for discussion of topic.

Autopsies

State v. Jackson, 298 S.E.2d 866 (1982) (Harshbarger, J.)

See EVIDENCE Opinion, Expert witness, (p. 180) for discussion of topic.

Autopsies may be performed by members of the chief medical examiner's office. His medical examiner assistants who perform autopsies are licensed physicians and responsible to him. Autopsy reports from the medical examiner's office shall be admissible as evidence in any court proceeding.

Chain of custody

State v. Young, 311 S.E.2d 118 (1983) (McGraw, C.J.)

The appellant contended it was error for the trial court to admit into evidence certain exhibits offered by the State. He argued that the State failed to establish a proper chain of custody for these exhibits and failed to contact the exhibits to him through ownership or actual possession.

Applies standard set forth in syl. pt. 1, *State v. Davis*, 266 S.E.2d 909 (W.Va. 1980). (Found in Vol. I under this topic.)

EVIDENCE

Chain of custody (continued)

State v. Young, (continued)

"The preliminary issue of whether a sufficient chain of custody has been shown to permit the admission of physical evidence is for the trial court to resolve. Absent abuse of discretion, the decision will not be disturbed on appeal." Syl. pt. 2, *State v. Davis*, 266 S.E.2d 909 (W.Va. 1980).

The Supreme Court found the State went to great lengths to trace the chain of custody of each of the exhibits from the time they were taken into custody, through their use at the appellant's first trial and their subsequent admission to the appellant's retrial. The Court noted that since this interval of time encompassed a period of over four years, it was understandable that not every moment of time was accounted for. The Court found there appeared to be no legitimate doubt on the record that the exhibits were genuine and free from tampering or material alteration. All of the exhibits were sufficiently connected to the crime or to the defendant.

The Court found that it could not dispute that the clothing taken from the appellant at the time of his arrest was sufficiently connected to the appellant, and that each of the exhibits was shown by testimony to be in substantially the same condition as when taken into custody by authorities. Accordingly the trial court did not err in permitting the admission of these exhibits.

Circumstantial

State v. Hall, 298 S.E.2d 246 (1982) (McHugh, J.)

See RECEIVING STOLEN GOODS Elements of the offense, (p. 438) for discussion of topic.

EVIDENCE

Collateral crimes

State v. Ruddle, 295 S.E.2d 909 (1982) (Per Curiam)

Applying the standard set forth in syl. Pts. 11 and 12, *State v. Thomas*, 157 S.E.2d 640, 203 S.E.2d 445 (1974), and *State v. Harris*, 272 S.E.2d 471 (W.Va. 1980) the Supreme Court found that evidence of sales of marijuana which occurred months before the delivery charge was not necessary or relevant to show any of the exceptions allowing admission of evidence of collateral crimes, and that it gave use to inference that because the appellant had previously engaged in sales of marijuana he was likely to have committed the crime charged. The conviction was reversed on this ground.

State v. Pancake, 296 S.E.2d 37 (1982) (Harshbarger, J.)

Evidence of other misconduct may be admitted to prove any "relevant fact other than criminal disposition." Evidence that a defendant committed violent or turbulent acts toward a rape victim or towards others about which the victim was aware, is relevant to establish the fear that is a major element of proof of first-degree sexual assault.

Admission of such evidence, discretionary with a trial court, was not error. Defendant would have been entitled to a cautionary instruction, but did not ask for one.

State v. Gum, 309 S.E.2d 32 (1983) (McGraw, J.)

The appellant was convicted of first degree murder for the murder of his brother. The appellant alleged the trial court erred in allowing the State to introduce testimony to the effect that he had burned automobiles for the insurance money. The appellant also complained of the admission into evidence of testimony concerning his alleged attempts to hire two of the State's witnesses to kill his wife.

Applies standard set forth in syl. pt. 12, *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974). (See *State v. Frasher*, 265 S.E.2d 43 (W.Va. 1980). (Found in Vol. I under this topic.)

Collateral crimes (continued)

State v. Gum, (continued)

The Supreme Court found that the admission of testimony concerning the alleged blackmailing of the appellant by his brother and his wife over the burning of automobiles for the insurance money went to establish motive, and not his propensity toward criminality. The Court found the admission of such testimony was permissible under the first exception in *Thomas*.

The Supreme Court compared this factual situation with the factual situation in *Blackburn v. State*, 290 S.E.2d 22 (W.Va. 1982) and found that the introduction of testimony concerning the appellant's attempts to procure the murder of his wife bolstered testimony concerning the appellant's potential motives and tended to establish a common scheme or plan for the demise of both the appellant's brother and his wife.

State v. Watson, 318 S.E.2d 603 (1984) (Miller, J.)

At trial, appellant's photograph, identified by two witnesses, was introduced and given to the jury. On the reverse side as well as on the photo, the appellant's name appeared with the remarks "Other Remarks Grand larceny, Tampering with motor vehicles, Carrying Concealed Weapons".

The Supreme Court found there was no objection to the admission of the evidence on the basis of the notations and the failure to object precluded their review of the assignment. Since the case was reversed on other grounds, the Court observed that under *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974) and other holdings, evidence of collateral crimes is generally inadmissible.

State v. Clements, 334 S.E.2d 600 (1985) (Brotherton, J.)

Appellant was convicted of murder and voluntary manslaughter. He contends it was error for the State to attempt to introduce evidence of "collateral crimes" of rape. This offer was made in open court with the public, but not the jury present. Although the evidence was held inadmissible, the appellant claims that this public release of information about possible prior crimes pre

EVIDENCE

Collateral crimes (continued)

State v. Clements, (continued)

judiced his right to a fair trial. The Court found the question is not whether the public in general was prejudiced against the defendant, but whether the jury was prejudiced against the defendant. The Court found that while it may have been better for the prosecutor to have presented this evidence in as *in camera* hearing before the court alone, any error is harmless where the appellant has not shown that the evidence may have prejudiced the jury.

State v. Cabalceta, 324 S.E.2d 383 (1984) (Per Curiam)

Appellant was convicted of manufacturing marijuana. During cross-examination, the trooper who executed the search warrant testified that upon searching the house, one of the conservation officers found marijuana in the appellant's suitcase. This evidence had been disclosed prior to trial, and the court ruled *in limine* to exclude it on the ground that it was unrelated to the charge on which the appellant was being tried. The trial judge summoned counsel to the bench, believing the witness had not been informed of the *in limine* ruling, and had not been responsive in answering the question. However, the judge believed there was no error.

Defense counsel declined the offer of a cautionary instruction, apparently not wanting to call attention to the testimony. After the trooper and one more State's witness testified, defense counsel moved for a mistrial. The judge denied the motion on the ground the question "did open the door."

"The general rule is that the State, in a criminal case, may not introduce evidence of a substantive offense committed by the defendant which is separate and distinct from the specific offense charged in the indictment." Syl. pt. 1, *State v. Moubray*, 81 S.E.2d 117 (W.Va. 1954).

The Court found the ruling *in limine* comported with the general rule on admissibility of evidence of collateral offenses. The Court did not believe the evidence falls within any of the exceptions delineated in *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974), nor did they accept the trial court's reasoning that the trooper's response was somehow invited.

EVIDENCE

Collateral crimes (continued)

State v. Cabalceta, (continued)

The Court found, however, that upon review of the entire record, there was no prejudice to the appellant resulting from the single reference to marijuana being discovered in her suitcase, particularly in light of the decision by defense counsel not to give a cautionary instruction. Furthermore, the Court found there was considerable delay in moving for a mistrial.

Comparative testimony

State v. Hall, 304 S.E.2d 43 (1983) (Neely, J.)

Applies standards set forth in syl. pt. 3, *State v. Atkins*, 261 S.E.2d 55 (W.Va. 1979). (Found in Vol. I under this topic.)

Corroboration

Sexual assault

State v. Ray, 298 S.E.2d 921 (1982) (Miller, C.J.)

See SEXUAL ASSAULT Instructions, (p. 550) for discussion of topic.

Display of items not in evidence

State v. Kopa, 311 S.E.2d 412 (1983) (McHugh, J.)

Applies standard set forth in syl. pt. 3, *State v. Oldaker*, 304 S.E.2d 843 (W.Va. 1983).

The appellant alleged the trial court erred in allowing a knife to be displayed in the courtroom upon the assurance of the prosecution it would be connected to the murder.

Display of items not in evidence (continued)

State v. Kopa, (continued)

The knife had been found in the vehicle the appellant has borrowed the night of the murder. The medical examiner testified it could have been the murder weapon, but on cross examination testified five knives from the courthouse kitchen could have inflicted the wounds. The knife was excluded from the trial upon appellant's objection.

The Supreme Court found the trial court did not abuse its discretion when it allowed the knife to be displayed in the courtroom but later excluded it from evidence.

Evidence of guilt of another

State v. Zaccagnini, 308 S.E.2d 131 (1983) (Miller, J.)

The defendant contended the trial court erred in refusing to allow defense counsel to adduce evidence regarding the arrest of two other persons for the same crime.

"For evidence of the guilt of someone other than the accused to be admissible, it must tend to demonstrate that the guilt of the other party is inconsistent with that of the defendant." Syllabus point 5, *State v. Frasher*, 265 S.E.2d 43 (W.Va. 1980).

"In a criminal case, the admissibility of testimony implicating another person as having committed the crime hinges on a determination of whether the testimony tends to directly link such person to the crime, or whether it is instead purely speculative. Consequently, where the testimony is merely that another person had a motive or opportunity or prior record of criminal behavior, the inference is too slight to be probative and the evidence is therefore inadmissible. Where, on the other hand, the testimony provides a direct link to someone other than the defendant, its exclusion constitutes reversible error." Syl. pt. 1, *State v. Harman*, 270 S.E.2d 146 (W.Va. 1980), here defense counsel attempted to introduce evidence of arrest warrants issued for two others for delivery of LSD on the same day. The defense was

EVIDENCE

Evidence of guilt of another (continued)

State v. Zaccagnini, (continued)

interested in showing that perhaps one of the others, and not the defendant, delivered the drugs. The State objected responding that the two individuals were charged with aiding and abetting, not with the sale.

The Supreme Court found the trial court was correct in refusing to adduce evidence regarding the warrants since it was clear the charges for aiding and abetting were not inconsistent with the defendant's charge for delivery.

Defendant also contended it was error to preclude his attorney from introducing evidence that another individual who was present in the store, had in the past dealt in drugs. The Supreme Court found no merit to this since the defendant testified to this fact on direct.

Expert witness

State v. Oldaker, 304 S.E.2d 843 (1983) (Harshbarger, J.)

Syl. pt. 2 - Under proper circumstances, West Virginia courts will permit expert testimony about the *modus operandi* of criminals.

Where an FBI agent was qualified to give expert testimony about the *modus operandi* of car thieves, and, in addition, had investigated the particular car theft, admission of his expert testimony was not an abuse of the trial court's discretion. While the evidence may not have been particularly probative of defendant's conduct or knowledge, it did not tend to prove that the vehicle was stolen.

Treatises

Thornton v. Pushkin, 305 S.E.2d 316 (1983) (Miller, J.)

Syl. pt. 2 - Most courts have sanctioned the use of authoritative learned treatises in the cross-examination of expert witnesses to some degree.

EVIDENCE

Treatises (continued)

Thornton v. Pushkin, (continued)

Syl. pt. 3 - Where a treatise is recognized by a medical expert witness as authoritative, then he can be asked about its statements for purposes of impeachment during cross-examination.

Syl. pt. 4 - If a medical expert witness refuses to recognize a medical treatise as authoritative, the cross-examining party may prove the authoritativeness of the medial treatise, either through judicial notice or through the testimony of another medical expert witness. Once the trial court had concluded that the authoritativeness of the medical treatise has been established, then the expert may be cross-examined on it.

False testimony

State v. Ashcraft, 309 S.E.2d 600 (1983) (McGraw, C.J.)

The appellant alleged that one of the State's witnesses testified falsely, either intentionally or through ignorance.

The Supreme court found the relevance of this allegation on appeal to be questionable. The appellant did not seek a new trial on the basis of newly discovered evidence. Neither are unsupported allegations of perjury generally considered grounds for appeal. The Court also noted that this same witness made an apparent inconsistent statement at the preliminary hearing, but defense counsel failed to cross-examine on this point. Given these considerations, the Court declined to discuss the allegation further.

Flight

State v. Richey, 298 S.E.2d 879 (1982) (Miller, C.J.)

Applies standard set forth in syl. pt. 6, *State v. Payne*, 280 S.E.2d 72 (W.Va. 1981). (Found in Vol. I under this topic.)

Flight (continued)

State v. Richey, (continued)

However, the Supreme Court found that the *Payne* decision was handed down after the trial in this case and no *in camera* hearing was requested or held. Consequently, no error could be claimed based on the failure to hold an *in camera* hearing since no request was made. The Supreme Court found that Payne's *in camera* hearing procedure is not a constitutional dimension right and, therefore, retroactively is limited to as per *State v. Gangwer*, 283 S.E.2d 839 (W.Va. 1981). (See RETROACTIVITY In general, (p. 446)).

The Supreme Court found that facts of flight existed in the present case since the defendant was personally aware of the indictment and the arraignment date, and did not appear at the prescribed date. The flight issue was initially raised by the defense. Furthermore, the trial court permitted the defense to introduce evidence to show the defendant's reasons for leaving and his voluntary return. Under all these circumstances, the Court did not find the giving of the flight instruction to be reversible error.

State v. Williams, 305 S.E.2d 251 (1983) (McGraw, J.)

Appellant was convicted of murder, arson and robbery. The appellant alleged the trial court erred in permitting the State to introduce evidence that the appellant fled the country immediately following the victim's death. The appellant alleged the court erred in admitting the evidence without first holding a hearing out of the presence of the jury to determine its probative value.

Applies standard set forth in syl. pt. 6, *State v. Payne*, 280 S.E.2d 72 (W.Va. 1981). (Found in Vol. I under this topic.)

The Supreme Court found there was no request by either the State or the defense for an *in camera* hearing and that, consequently, there was no error in this case in the trial court's admission of the evidence of flight.

EVIDENCE

Fruits of the poisonous tree

State v. Easter, 305 S.E.2d 294 (1983) (Per Curiam)

See SELF-INCRIMINATION - STATEMENTS BY DEFENDANT Voluntariness, Right to counsel, (p. 514) for discussion of topic.

State v. Mays, 307 S.E.2d 655 (1983) (Neely, J.)

See SELF INCRIMINATION - STATEMENTS BY DEFENDANT Voluntariness, Unreasonable delay in taking before magistrate, (p. 525) for discussion of topic.

Gruesome photographs

State v. Mullins, 301 S.E.2d 173 (1982) (Per Curiam)

Applies standard set forth in syl. pt. 6, *State v. Buck*, 294 S.E.2d 281 (W.Va. 1982). (Found in Vol. I under this topic.)

The Supreme Court found that the photos introduced in this case were not gruesome. They were black and white photographs and there was no showing of any blood in the photographs. Five of the photographs depicted the deceased's position in his car and did not reveal the gunshot wound. The sixth was a photograph of the deceased's chest and face with no contortion of the facial features and the entry wound had the appearance of a small dark mole on the side of the forehead.

State v. Young, 311 S.E.2d 118 (1983) (McGraw, J.)

The appellant contended that the trial court erred in admitting a photograph of the deceased victim. The photo was black and white and depicted the victim as she was found in bed lying on her back, partially nude, with her hands tied, and with several stab wounds to the upper torso.

Gruesome photographs (continued)

State v. Young, (continued)

The Court set forth in *State v. Rowe*, 259 S.E.2d 26 (W.Va. 1979) guidelines to assist trial courts in determining the admissibility of photographs of victims in criminal cases where the objection is made that the photos are gruesome and therefore unduly prejudicial.

The first step involves the determination of whether the photographs are in fact "gruesome." If the court makes the preliminary finding that the photographs are gruesome, they are assumed to have a prejudicial and inflammatory effect. The State must meet the second step of the *Rowe* inquiry and show that the photographs are of essential evidentiary value to its case.

The Supreme Court was unable to say with certainty whether the trial court did not believe the photograph was gruesome, or, whether the court found the photograph to be gruesome but believed that its probative value outweighed any inflammatory effect.

The Supreme Court did not believe the photograph in this case was sufficiently gruesome as to preclude its admission into evidence. The Supreme Court found the photo did not depict the body of the victim after autopsy procedures; nor did it emphasize contorted facial or bodily feature, or otherwise emphasize or magnify any revolting aspects of the corpse. Though the photograph showed much blood, the Court found its impact was lessened in a black and white photograph.

State v. Wilson, 310 S.E.2d 486 (1983) (Per Curiam)

Appellant was convicted of second degree murder. The victim died as a result of a severe beating to the head and neck area. At trial the State attempted to introduce an 8 x 10 color photo of the victims lacerated and bloody face for the purpose of identification. The trial court ruled the photo was gruesome but withheld a ruling on its admissibility. Later in the trial when the State again attempted to introduce the photo to show malice and the brutality of the victims beating, the court refused to allow it in.

EVIDENCE

Gruesome photographs (continued)

State v. Wilson, (continued)

The defense elicited testimony, during their presentation of evidence, that a co-defendant gave a statement to the effect he had struck the victim with a brick. The defense then introduced a loose brick found near the murder scene. After the brick had been introduced into evidence the State again moved to introduce the photo on the theory that it showed lack of imprints from a brick. The trial court allowed the photo on the grounds that the defense had made the condition of the victim a major issue.

The Supreme Court found that they failed to see the connection between the photo and the brick since one could not determine from the photo whether the victim had been struck with a brick, fist or some other object. The Court noted the State's pathologist testified at some length of the injuries and he testified there was only a slight chance that an object like a brick was used to inflict the victim's wounds. Other State witnesses also testified with regard to the victim's condition after the beating.

In view of all this, the Supreme Court found the photo was not essential to the State's case under any of the theories for which it was offered. They found the photo added nothing essential to the State's proof and the court erred in allowing its admission.

State v. Tennant, 319 S.E.2d 395 (1984) (Miller, J.)

The appellant was convicted of leaving the scene of an accident in violation of *W.Va. Code* 17C-4-1. One of the passengers in his car was killed in the accident. Appellant contends one of the State's photos, showing a portion of the deceased passenger's body under the car, was gruesome and should not have been admitted.

The Supreme Court found the photo was black and white and was taken some distance from the car. They found the body was fully clothed, there was no sign of blood or other physical trauma, and concluded the photo was not gruesome.

EVIDENCE

Gruesome photographs (continued)

State v. Trail, 328 S.E.2d 671 (1985) (Brotherton, J.)

Appellant contends the trial court should not have admitted certain photographs into evidence. Both photos showed evidence of the alleged injuries. The Court found the black and white photocopies provided in the record do not reflect substantial blood or open wounds.

The Court found that, in general, photographs of victims are admissible if they are relevant. Here, the photos served to substantiate the testimony of the victims regarding their injuries, and thus were relevant. The photos admitted were of the victim of sexual assault's face, showing bruises, and of the back of her companion's head, showing laceration. The trial court appeared to have assumed that they were not gruesome under the standards set out in *State v. Rowe*, 259 S.E.2d 26 (W.Va. 1979) and the Supreme Court did not find this to be an abuse of discretion.

Hearsay

In general

State v. Richey, 298 S.E.2d 879 (1982) (Miller, J.)

Syl. pt. 9 - We have generally defined hearsay as where a witness testifies in court with regard to out-of-court statements of another for the purpose of proving the truth of the matter asserted.

The appellant claimed it was error not to permit a defense witness to testify about a conversation he had with one of the assistant prosecutors. The Supreme Court found that the conversation was clearly hearsay and that no claim was made that the statement fell within any of the recognized exceptions to the hearsay rule.

EVIDENCE

Hearsay (continued)

In general (continued)

State v. Zaccagnini, 308 S.E.2d 131 (1983) (Miller, J.)

Defendant contended the court erred in admitting hearsay evidence. The officer testified "there was a phone call made by Mr. Burroughs [the informant] to Mr. Zaccagnini at the office . . . "Defense counsel objected, the objection was overruled and the examination proceeded to an entirely different matter."

The Supreme Court found: "We have generally defined hearsay s where a witness testifies in court with regard to out-of-court statements of another for the purpose of proving the truth of the matter asserted." Syllabus point 9, *State v. Richey*, 298 S.E.2d 879 (W.Va. 1982).

The Court concluded the officer did not testify about the statement of the informant or the defendant, but that he only indicated the informant had called the defendant. The Court did not believe this constituted hearsay.

State v. Simmons, 309 S.E.2d 89 (1983) (Miller, J.)

The appellant alleged that a witness for the defense should have been allowed to relate in her testimony a statement made by the victim to the witness several hours before the homicide. The appellant contended this statement would tend to show that the deceased wanted to provoke a confrontation or to agitate the defendant.

The Supreme Court found the remark was hearsay and that even if they were to assume that such statement could be admitted as a statement of present mental intent, it was cumulative because the defendant along with several of her witnesses testified as to the victim's harassment of the defendant.

EVIDENCE

Hearsay exceptions

Business entry

State v. Fairchild, 298 S.E.2d 110 (1982) (McGraw, J.)

Syl. pt. 4 - Records made routinely in the regular course of business, at the time of the transaction or occurrence, or within a reasonable time thereafter, are generally trustworthy and reliable, and therefore ought to be admissible when properly verified.

It is not necessary that the maker of the record be called to testify to verify the authenticity of the entry. The trustworthiness of the entry may be established by the testimony of a custodian of the business record who can "adequately demonstrate the regularity of the particular record keeping as an established procedure within the business routine." However, in no instance may records of this kind prove themselves.

The Supreme Court found that in this case, a proper foundation was not laid for admission of the checking ledger as a business record. No testimony was adduced to show that the entries in the checking ledger were made in the regular course of business, that the entries were made at or near the time the checks were issued, or even that the person who made the entries was an employee of the business. Without such a preliminary showing the checking ledger should not have been admitted.

The Supreme Court found that the record contained evidence independent of the checking ledger which demonstrated that the appellant received corporate funds for helping solicit sales in the business, and that the appellant knew the money he received came from funds given by investors he had recommended. Consequently, the Court did not believe admission of the ledger was sufficiently prejudicial to require reversal.

EVIDENCE

Declaration against penal interest

State v. Ashcraft, 309 S.E.2d 600 (1983) (McGraw, J.)

During the investigation of the victims death, the authorities obtained a statement from Denver Ash admitting that he, not the appellant, fired the fatal shot. Ash's statement was received by the defense as a result of discovery. During trial, defense counsel sought to place portions of Ash's confession in evidence through the cross-examination of Trooper Frum. The State initially objected to admission of portions of the statement contending it should be read in its entirety. The trial court interjected that the statement went beyond the scope of Trooper Frum's direct examination. The judge instructed defense counsel that the appellant could call Trooper Frum as its own witness, but could not question the witness concerning the statements during cross. Defense counsel immediately requested permission to make the Trooper a defense witness to which the court replied "not at this time."

Defense counsel tried again to place Ash's statement in evidence while cross-examining another prosecution witness, Trooper Lanham. The court *sua sponte* foreclosed questioning on the statement on the grounds that such evidence would be inadmissible hearsay. The appellant alleges on appeal that Ash's confession is exculpatory evidence which he is entitled to place before the jury as an admission against interest exception to the hearsay rule.

Applies standard set forth in syl. pt. 2, *State v. Williams*, 249 S.E.2d 752 (W.Va. 1978). (Found in Vol. I under this topic.)

The Supreme Court found that in this case, the appellant made no effort to call either Trooper Frum or Trooper Lanham during the defense's case in order to place Ash's statement into evidence. Neither did defense counsel show or attempt to show that Ash was unavailable to testify himself. Accordingly, the Supreme Court found no error in the trial court's refusal to permit counsel to elicit Ash's confession upon cross-examination of the prosecution's witness.

This case was reversed on other grounds. The Court noted that upon retrial, if the appellant satisfied the criteria of *Williams*, the trial court, upon a proper finding of trustworthiness, could permit Ash's confession to be admitted into evidence.

EVIDENCE

Hearsay exceptions (continued)

Declaration against penal interest (continued)

Naum v. Halbritter, 309 S.E.2d 109 (1983) (Neely, J.)

The Supreme Court noted that in this case, the petitioner, a prosecuting attorney was called to testify before a grand jury. He testified that his only knowledge of Anita McLaughlin was that she was a waitress at a bar he occasionally visited. Approximately on year later he was indicted for false swearing. In rebutting the petitioner's claim that he had only passing knowledge of Ms. McLaughlin (an apparent homicide victim) the special prosecutor relied upon statements allegedly made by Ms. McLaughlin to friends and family. The prosecution claimed those statements indicated the petitioner had had intimate relations with the deceased on at least one occasion. At the time the evidence was offered, the petitioner made a motion *in limine* to foreclose use of the out-of-court statements as hearsay. The respondent judge ruled the statements were admissible as declarations against penal interests. Petitioner sought a writ of prohibition.

The Supreme Court found it was worth noting that federal courts are in accord with the W.Va. view that the exception to the hearsay rule for statements made against penal interest should be applied only when other factors make those statements appear credible.

The Court noted that in *State v. Williams*, 249 S.E.2d 752 (W.Va. 1978) they carved out a limited exception where the statement against penal interest was offered by the defendant to corroborate qualifications on the admission of an out-of-court statement against penal interest. The Court noted that the holding in *Williams* that under certain limited circumstances admissions against penal interests may be introduced did not create a *per se* exception to the general hearsay rule.

In this case, the Supreme Court found that because they did not find sufficient indicia of reliability present and because they were reluctant to extend the exception to cases in which the prosecution relies exclusively on hearsay to establish guilt, they held the out-of-court statements made by the deceased were inadmissible.

Hearsay exceptions (continued)

Declaration against penal interest (continued)

Naum v. Halbritter, (continued)

The Court noted Ms. McLaughlin's "statements against penal interest" had to do with acts of prostitution. The remarks were made to intimate friends and members of her family. The Court noted that her revelations as to one particular act were hardly likely to alter their view of her character and it was even less likely that the admission to confidants would lead to criminal prosecutions. Furthermore, the Court noted that even if the statements were in some minor sense against her penal or social interest, the potential damage to her reputation in no way counterbalanced the injury the petitioner could suffer if the statements were ruled admissible. The Court found that because the admission of hearsay statements requires a balancing, it seemed improper to allow statements that are only nominally against the penal interest of the declarant to be admitted when those statements could destroy the life and reputation of a criminal defendant.

The Supreme court found statements against penal interest are often found admissible because it is presumed that individuals would not make statements that placed their own liberty in danger unless those statements were accurate. Here, the Court found it was not difficult to find other motivations for the statement which could be explored on cross-examination if it were possible for Ms. McLaughlin to appear in the courtroom. The Court found since she is not available for cross-examination, the alternative explanations of her out-of-court statements cast sufficient doubt on their reliability to make them admissible.

The Court noted the rule against "hearsay" is not a technicality that allows the guilty to go free. It has its roots in the fundamental principle that legal determinations should be based, to extent possible, on reliable truths. If the only evidence professed is insufficiently reliable, the Court noted that we cannot know that a defendant is guilty and under our system he must be presumed innocent.

EVIDENCE

Hearsay-exceptions (continued)

Declaration against penal interest (continued)

Naum v. Halbritter, (continued)

Syl. pt. 3 - In deciding whether to admit a hearsay statement that is against the penal interest of the extra-judicial declarant, "The court should consider any possible self-interest for the declarant to make the statement, the trustworthiness of the witness testifying as to the statement, the presence of any evidence tending to corroborate the truth of the statement, and any other factors bearing on the reliability of the evidence proffered." *State v. Williams*, 249 S.E.2d 752, 757 (W.Va. 1978).

The Supreme Court also found that in addition to the evidentiary considerations of the hearsay rule, allowing a prosecution to proceed solely on evidence which is not subject to cross-examination raises a serious constitutional issue. The Court noted that the U.S. Supreme Court has made clear that the rule against hearsay and the Sixth Amendment guarantee of a right to confrontation are not entirely co- extensive. In this case without Ms. McLaughlin's alleged statement, there is no evidence that the petitioner swore falsely. The Court found that if the right to confront one's accusers means anything, it means that citizens should not be deprived of their liberty and have their reputation soiled solely on the basis of statements made outside the legal system before uncritical listeners who relay those assertions to a jury which has no reliable basis for judging credibility and no other evidence to consider in determining guilt.

The Court found that even without reference to the Sixth Amendment, a conviction based entirely on *ex parte* statements which are not subject to cross-examination raises serious due process questions.

Finally, the Court emphasizes that although the primary basis for the ruling in this case was their belief the evidence was inadmissible hearsay as a matter of W.Va.'s common law of evidence, they expresses grave reservations about whether the defendant's constitutional rights were adequately protected.

See PROHIBITION Pre-trial evidentiary rulings, (p. 422) for discussion of topic.

EVIDENCE

Hearsay-exceptions (continued)

Former testimony

State v. Jacobs, 298 S.E.2d 836 (1982) (Per Curiam)

The appellant contended that the trial court erred when it refused admission of a portion of a transcript of testimony given by a defense witness at the appellant's former trial involving another theft. The appellant sought to admit the transcript in order to impeach the credibility of a State witness. The trial court refused admission of the transcript on the grounds that no prompt effort had been made by defense counsel to secure the witness' attendance at trial and that his testimony was irrelevant to the issues in the present case.

Applying the standards set forth in *State v. R.H.*, 273 S.E.2d 578 (W.Va. 1980) the Supreme Court found that the trial court correctly ruled that the transcript was inadmissible because no effort had been made by the defense to secure the witness' attendance at trial.

Where defendant has been once tried upon a criminal charge, and subsequent to such trial a witness who testified in defendant's behalf disappears through no fault of defendant, and, although diligently sought by defendant, cannot be found so as to testify at a later trial of defendant upon the same charge, the testimony of such witness given at the former trial is properly admissible.

Such evidence is not admissible, however, unless it be shown that defendant has not been able to find the witness after diligent search; the mere issuance of subpoenas and placing them in the hands of the sheriff or other officer to be served, as shown in the instant case, is sufficient proof of diligence in that behalf. Syl. Pts. 4 and 5, *State v. Sauls*, 97 W.Va. 184, 124 S.E. 670 (1924).

The Supreme Court found that the same requirement of due diligence is applicable to this case. The Court found that the issuance of a subpoena in Doddridge County cannot be considered due diligence when defense counsel knew of the location of the witness in Louisiana, and primarily as a matter of tactics, chose not to invoke the statutory procedure for summoning out-of-state witnesses. Accordingly, the Supreme Court found no error in the trial court's refusal to admit the transcript of the former testimony.

EVIDENCE

Hearsay-exceptions (continued)

Present mental intent

State v. Simmons, 309 S.E.2d 89 (1983) (Miller, J.)

See EVIDENCE Hearsay, In general, (p. 170) for discussion of topic.

Spontaneous declarations

***State v. Ray*,** 298 S.E.2d 921 (1982) (Miller, C.J.)

Applies standards set forth in syl. pt. 2, *State v. Young*, 273 S.E.2d 592 (W.Va. 1980). (Found in Vol. I under this topic.)

In this case, the appellant argued that the trial court erred in allowing the stepmother to testify over objection, as to what was told by the victim. The Supreme Court found that the victims statement to her stepmother constituted an admissible spontaneous declaration under the test set out in *Young*. The statement was made by one who was the victim of the crime, and it related to that event in that it described and explained what happened. It did not involve a mere expression of opinion. The Supreme Court believed that the statement was made at the time and under circumstances which exclude the view that it was made as a result of deliberation.

Identity of victim

State v. Wyant, 328 S.E.2d 174 (1985) (Per Curiam)

See HOMICIDE Evidence, Identity of victim, (p. 223) for discussion of topic.

EVIDENCE

Impeachment

See EVIDENCE Prior convictions, (p. 184) for discussion of topic.

See SELF-INCRIMINATION - STATEMENTS BY DEFENDANT Voluntariness, Use in evidence, (p. 532, 533) for discussion of topic.

See WITNESSES Impeachment, (p. 602) for discussion of topic.

Irrelevant

State v. Wyant, 328 S.E.2d 174 (1985) (Per Curiam)

See EVIDENCE Scientific tests, (p. 193) for discussion of topic.

Juvenile fingerprints

State v. Lucas, 299 S.E.2d 21 (1982) (Per Curiam)

Applies standard set forth in syl. pt. 2, *State v. Van Isler*, 283 S.E.2d 836 (W.Va. 1981). (Found in Vol. I under this topic.)

The Supreme Court found that it was undisputed that the fingerprints used for the comparisons were taken from the appellant when he was a juvenile, in connection with juvenile proceedings. The Court found that the admission into evidence of the juvenile fingerprint card and the results of comparisons between that card and prints lifted from the scene of the break-in was error requiring reversal of the appellant's conviction.

Leading questions

State v. Fairchild, 298 S.E.2d 110 (1982) (McGraw, J.)

See WITNESSES Leading questions, (p. 616) for discussion of topic.

EVIDENCE

Modus operandi

State v. Oldaker, 304 S.E.2d 843 (1983) (Harshbarger, J.)

See EVIDENCE Expert witness, (p. 163) for discussion of topic.

Not introduced at first trial

State v. Clements, 334 S.E.2d 600 (1985) (Brotherton, J.)

Appellant was convicted of murder and voluntary manslaughter. A critical element of the second trial was a comparison of blood found in the appellant's van with that of members of the family of one of the victims. This evidence was not offered by the prosecution at the first trial. The appellant contends the introduction of this evidence was newly discovered. The Supreme Court held that, where a second trial is ordered, the fact that the prosecution refrained from presenting an item of evidence at the first trial is not grounds for an objection to its admission in any subsequent trial.

Opinion

Expert witness

State v. Pancake, 296 S.E.2d 37 (1982) (Harshbarger, J.)

Defendant in sexual assault trial attempted to elicit testimony from expert on female sexuality about the unlikelihood of a woman having an orgasm while she was having a fearful sexual experience. After reviewing the vouched record, the Supreme Court found that the doctor's testimony would have consisted of unsubstantiated generalities, and that there was no abuse of discretion in excluding her testimony.

State v. Clark, 297 S.E.2d 849 (1982) (McGraw, J.)

In this state, witnesses, expert or otherwise, may not testify conclusively on matters which are ultimately to be decided by the jury.

Opinion (continued)

Expert witness (continued)

State v. Clark, (continued)

In this case, the Supreme Court found it was improper to permit the State medical examiner to testify conclusively that homicide was the manner of death. Although the State medical examiner may not testify as to manner of death, he may describe the type and nature of wounds suffered by the victim. He may give his opinion as to the physical and medical cause of death. He may describe tests conducted as part of his examination, and may answer properly phrased hypothetical questions based upon the evidence, but he may not invade the fact-finding function of the jury by making the ultimate factual-legal conclusion that is central to an element of the crime.

Examining physicians may testify regarding their observations, examinations and findings, but may not testify conclusively on the ultimate issue for the jury. The Court did not decide whether this type of conclusion standing alone is reversible error since the case was reversed on other grounds.

State v. Jackson, 298 S.E.2d 866 (1982) (Harshbarger, J.)

The State medical examiner testified from a report describing the victim's autopsy and gave his opinion about the cause of death. An assistant, not the medical examiner, performed the autopsy.

The Supreme Court found that any physician qualified as an expert may render an opinion about physical and medical cause of injury or death. This opinion can be based on facts in evidence including an autopsy report.

State v. Mullins, 301 S.E.2d 173 (1982) (Per Curiam)

See APPEAL Failure to preserve for appeal, Failure to object, (p. 24) for discussion of topic.

EVIDENCE

Non-expert witness

State v. Clark, 297 S.E.2d 849 (1982) (McGraw, J.)

See EVIDENCE Opinion, Expert witness, (p. 179) for discussion of topic.

Out-of-court experiment

State v. Kopa, 311 S.E.2d 412 (19830 (McHugh, J.)

The appellant was convicted of first degree murder. On appeal he alleged the trial court erred when it refused to admit into evidence the taped results of an out-of-court voice experiment conducted by defense counsel. The experiment was calculated to demonstrate that the rescue squad member who received the anonymous telephone call directing him to send an ambulance to the address of the victim could not identify the voice of the caller as that of the appellant's girlfriend. The experiment was conducted from the office of defense counsel.

Syl. pt. 5 - The results of an out-of-court experiment will not be admitted into evidence unless the party seeking to introduce such evidence demonstrates that the conditions under which the experiment was conducted were substantially similar to the original conditions sought to be recreated and the question of whether to admit such evidence for consideration by the jury is within the sound discretion of the trial court.

The Supreme Court found the trial court did not err when it refused to admit the taped results of the experiment. The Court found the validity of the results questionable due to the fact that they were not conducted under substantially similar circumstances as the anonymous call, and, the lack of participation by the prosecution and the late hour of its offering to the trial court cast an aura of unreliability over the results.

EVIDENCE

Photographs

State v. Dye, 298 S.E.2d 898 (1982) (Per Curiam)

Applies standard set forth in syl. pt. 3, *State v. Reed*, 276 S.E.2d 313 (W.Va. 1979). (Found in Vol. I under this topic.)

A photograph of the victim was introduced in an armed robbery case. The photograph showed the victim's head with the wound inflicted by the defendant when he struck the victim with a glass bottle. The Supreme Court could not say that the trial court clearly abused its discretion in admitting the photograph.

State v. Audia, 301 S.E.2d 199 (1983) (McHugh, J.)

The appellant contended he was prejudiced by the trial court's admission into evidence of a photograph of the victim of the robbery. The photograph was a small black and white snapshot of an elderly man with an apparently minor laceration on his right forehead. The Supreme Court found that the photo was not gruesome and there was no abuse of discretion in its admission.

Polygraph

State v. Gum, 309 S.E.2d 32 (1983) (McGraw, J.)

The appellant alleged the trial court erred in refusing to admit into evidence the questions asked, answers given and the scientific results of two polygraph exams given to a State's witness, and the polygraph exam given to the appellant. The trial court conducted an *in camera* hearing to determine the admissibility of these examinations. The Supreme Court found the record revealed that, apart from the results, no exculpatory material appeared therein.

Applies standard set forth in syl. pt. 2, *State v. Frazier*, 162 W.Va. 602, 252 S.E.2d 39 (1979). (Found in Vol. I under this topic.)

The Supreme Court concluded the trial court's refusal to admit the results of the polygraph exams was proper.

EVIDENCE

Polygraph (continued)

State v. Sheppard, 310 S.E.2d 173 (1983) (McGraw, J.)

At the conclusion of a competency hearing, the appellant requested he be permitted to take a polygraph test to refute the findings of the medical experts to the effect that he was pretending to suffer from amnesia. The Supreme Court noted that they had concluded in *State v. Frazier* that polygraph test results are not admissible for any purpose at a criminal trial. Here, the Court found that since they were of the opinion that it would have been error for the circuit court to consider the results of a polygraph test in making its determination of the appellant's mental competence, they found no error in the trial court's refusal to permit the appellant to take the test.

State v. Hartshorn, 322 S.E.2d 574 (1985) (Neely, C.J.)

Syl. pt. 3 - "Polygraph test results are not admissible in evidence in a criminal trial in this state." Syl. pt. 2, *State v. Frazier*, 162 W.Va. 602, 252 S.E.2d 39 (1979).

Prejudicial

Failure to connect evidence to the crime

State v. Hall, 328 S.E.2d 206 (1985) (Miller, J.)

Appellant was convicted of second degree murder and unlawful wounding. He contends the court erred in admitting a handgun and bullets at his trial. The State's evidence showed that the sheriff's investigating the shooting were advised that the gun had been taken to the defendant's home. One of the deputies testified he went to the defendant's home after the shooting and was given the gun and bullets by the defendant's wife. There was no testimony offered by the State ballistically linking the gun as the murder weapon.

EVIDENCE

Prejudicial (continued)

Failure to connect evidence to the crime (continued)

State v. Hall, (continued)

The Supreme Court found the State sufficiently connected the gun and bullets to the crimes charged to permit their introduction into evidence. The Court found there were eyewitness testimony connecting the defendant to the shootings with the use of a handgun and circumstantial evidence linking the defendant to the weapon as it was obtained from his home. The Court found no error.

Prior convictions

In general

State v. Beckett, 310 S.E.2d 883 (1983) (Miller, J.)

See WITNESSES Impeachment, Prior convictions, (p. 610) for discussion of topic.

Impeachment of character or reputation

State v. Tanner, 301 S.E.2d 160 (1982) (Harshbarger, J.)

The prosecution on cross-examination was permitted to bring out that the defendant had previously been convicted of robbery in Ohio. The trial court found that the defendant had placed his character in issue by testifying that he was drunk and coerced into committing the offense, and was thus properly subject to cross-examination on his prior conviction under *State v. McAboy*, 160 W.Va. 497, 236 S.E.2d 431 (1977). The trial court also ruled that the entire tape recorded statement was admissible on cross-examination. The tape recording contained a reference to the defendant's prior robbery conviction.

EVIDENCE

Impeachment of character or reputation (continued)

State v. Tanner, (continued)

The Supreme Court agreed that the defendant did not place his character in issue so as to permit his cross-examination on a prior robbery conviction. However, the Supreme Court found the error was harmless.

The Court applied standard set forth in syl. pt. 2, *State v. McKinney*, 244 S.E.2d 808 (W.Va. 1978), and found it was error to permit the defendant's cross-examination on a prior robbery conviction unless it could be said the defense of coercion or duress put his character in issue.

Syl. pt. 3 - A criminal defendant does not put his character in issue simply by introducing evidence supporting a defense of coercion or duress.

Nonetheless, the Supreme Court, applying the standard set forth in syl. pt. 2, *State v. Atkins*, 261 S.E.2d 55 (W.Va. 1979), *cert. denied*, 445 U.S. 904 (1980), found the error was harmless. The Court found that the defendant admitted that he committed the acts, his defense only denied his criminal intent at that time, and no other issue was presented by the evidence. The Court found he did not produce appreciable evidence to prove his defense by raising a reasonable doubt about his criminal intent, and the State's case was strong. On this record, the Supreme Court found no prejudice and could confidently say that the jury's verdict would not have been influenced and could not have been different on the evidence presented.

Prior out-of-court statements

See WITNESSES Impeachment, Prior inconsistent statements, (p. 610) for discussion of topic.

State v. Cochran, 310 S.E.2d 476 (1983) (Per Curiam)

See WITNESSES Impeachment, Prior inconsistent statements, (p. 612) for discussion of topic.

EVIDENCE

Rebuttal

State v. Oldaker, 304 S.E.2d 843 (1983) (Harshbarger, J.)

Syl. pt. 5 - "It is within the sound discretion of the court in the furtherance of the interest of justice to permit either party, after it has rested, to reopen the case for the purpose of offering further evidence and unless that discretion is abused the action of the trial court will not be disturbed." Syllabus point 4, *State v. Fischer*, 211 S.E.2d 666 (W.Va. 1974)." Syllabus point 4, *State v. Daggett*, 280 S.E.2d 545 (W.Va. 1981).

Permitting an officer who had not testified in the State's case in chief to give impeachment testimony on rebuttal was not an abuse of the trial court's discretion. Although the officer was available to testify in the State's case in chief his testimony would have been unnecessary and duplicative at that point.

State v. Peyatt, 315 S.E.2d 574 (1983) (McHugh, J.)

The appellant was convicted of incest, first degree sexual assault and third degree sexual assault. The indictment was based upon the allegations of the appellant's daughter who claimed the appellant had frequently engaged in sexual intercourse with her from the time of her fourth birthday until she was approximately twelve.

The appellant sought to show that the victim fabricated the story about the appellant as a result of her taking medication for epilepsy from which she suffered since age nine. The prosecution introduced rebuttal evidence to the effect that the medication the victim was taking to control her epileptic seizures would not alone cause her to fabricate the allegations against the appellant.

The appellant argued on appeal that the trial court erred when it permitted the prosecution to introduce the rebuttal evidence. He contended the evidence was outside the scope of proper rebuttal.

EVIDENCE

Rebuttal (continued)

State v. Peyatt, (continued)

Syl. pt. 3 - "Whether the state in a criminal proceeding may introduce further evidence after a defendant has rested his case is a matter with the sound discretion of the trial court, and the exercise of that discretion will rarely br cause for reversal. Point 2, Syllabus, *State v. Fitzsimmons*, 137 W.Va. 585, 73 S.E.2d 136 (1952)." Syl. pt. 8, *State v. Pietranton*, 140 W.Va. 444, 845 S.E.2d 774 (1954).

Syl. pt. 4 - "The admissibility of evidence as rebuttal is within the sound discretion of the trial court, and the exercise of such discretion does not constitute ground for reversal unless it is prejudicial to the defendant." Syl. pt. 4, *State v. Blankenship*, 137 W.Va. 1, 69 S.E.2d 398 (1952), *overruled on other grounds, State v. McAboy*, 160 W.Va. 497, 236 S.E.2d 431, 432 (1977).

The Supreme Court found that in this case, the trial court held an *in camera* hearing upon the issue of whether the prosecution would be allowed to present rebuttal evidence and the nature of that evidence. The appellant objected to the introduction of the rebuttal evidence on the ground the appellant had presented no evidence to imply that the medication was responsible for the victim's behavior.

The trial court ruled the appellant has "left an inference in the minds of the jury that this activity is related to the medication" and limited the evidence to the effect of the medication on the victim's veracity. The Supreme Court found the testimony was proper and the appellant was not prejudiced by its introduction.

State v. Boykins, 320 S.E.2d 134 (1984) (Per Curiam)

See WITNESSES Rebuttal, (p. 616) for discussion of topic.

EVIDENCE

Relevant

Prejudicial

State v. Oldaker, 304 S.E.2d 843 (1983) (Harshbarger, J.)

Applies standard set forth in syl. pt. 5, *Casto v. Martin*, 230 S.E.2d 722 (W.Va. 1976). (See *State v. Rector*, 280 S.E.2d 597 (W.Va. 1981). (Found in Vol. I under this topic.)

The introduction of expert testimony about the *modus operandi* of car thieves was not an abuse of discretion.

State v. Gum, 309 S.E.2d 32 (1983) (McGraw, C.J.)

Appellant alleged the trial court erred in denying his motion to suppress the introduction of the .22 caliber pistol which he had borrowed and which he had in his possession at the time of the victim's death.

"Motions to introduce and motions and objections for exclusion are addressed to the sound discretion of the court." *State v. Thomas*, 157 W.Va. 640, 657, 203 S.E.2d 445, 456 (1974).

As a general rule, instruments or objects which were involved in the commission of a crime are admissible evidence. *State v. Painter*, 135 W.Va. 106, 635 S.E.2d 86 (1950), *State v. Baker*, 33 W.Va. 319, 10 S.E. 639 (1889). The Supreme Court noted the connection between the instrument or object and the crime, however, need not to be established with absolute certainty.

"In the trial of an indictment of murder all instruments which the evidence *tends* to show were used in the perpetration of the crime, may be produced for the inspection of the jury." (emphasis added) Syl. pt. 1, *State v. Henry*, 51 W.Va. 283, 41 S.E. 439 (1902).

EVIDENCE

Relevant (continued)

Prejudicial (continued)

State v. Gum, (continued)

In this case, testimony by a forensic pathologist revealed that although the exact caliber of the guns not causing the fatal wound could not be determined, in his opinion the fatal shot was fired from a handgun or revolver. The investigating officer testified that although he asked the appellant to give him all the .22 caliber weapons in his possession and asked him specifically if he had any pistols, the appellant did not turn over the .22 caliber pistol he had in his possession. The appellant did not deny having possession of the pistol in question at the time of the victim's death. He testified that he informed the officers of this, but when the officer found out the gun did not have a scope, he didn't want it.

The Supreme Court found no error in the admission of the .22 caliber pistol.

State v. Ashcraft, 309 S.E.2d 600 (1983) (McGraw, C.J.)

The appellant contends it was error for the trial court to permit the State to introduce a .22 caliber bolt action rifle into evidence and to permit the State to exhibit and demonstrate the use of a Colt AR-15 rifle to the jury. The appellant contends there was no evidence linking either weapon to him or the occurrences that resulted in the victim's death.

The Supreme Court found there was ample evidence to support the admission of the .22 caliber rifle into evidence.

"The action of the trial court in admitting or excluding evidence in the exercise of its discretion will not be disturbed by the appellate court unless it appears that such action amounts to an abuse of discretion." Syl. pt. 10, *State v. Huffman*, 141 W.Va. 55, 87 S.E.2d 541 (1955).

The Supreme Court did not believe the trial court abused its discretion with regard to the admission of the .22 caliber rifle.

State v. Ashcraft, (continued)

The Supreme Court noted that the authorities did not recover the military-type automatic weapon which the testimony of several witnesses placed in the hands of the appellant prior to and during the gunfight with the victim. The State made no claim that the Colt AR-15 rifle exhibited to the jury was the actual weapon used by the appellant and did not seek its admission into evidence. Rather, it was used by prosecution witnesses as an aid in demonstrating the manner in which spent cartridges would be ejected so the jury could infer the location of the appellant during the confrontation. The Court noted that several witnesses testified that the appellant had in his possession a rifle substantially similar to the Colt AR-15 and that the appellant had admitted, in a statement given to law enforcement officials, that he used an AR-15 rifle in the shooting.

The Supreme Court found the probative value of the rifle outweighed any prejudicial effect on the jury, and the trial court did not abuse its discretion in permitting the State to use the rifle during examination of the prosecution witnesses

State v. Kopa, 311 S.E.2d 412 (1983) (McHugh, J.)

The appellant alleged the trial court erred in denying his motion to exclude a pair of gloves found in the vehicle, one of which had a bloodstain, a pair of appellant's tennis shoes, one of which had a speck of blood on it, and the expert testimony identifying the blood as human when the amount was too limited to specify type or group. The appellant alleged the prejudicial effect of the evidence outweighed their probative value and rendered them irrelevant.

The Supreme Court held the trial court did not abuse its discretion when it denied the appellant's motion to exclude the evidence.

EVIDENCE

Remote

Gough v. Lopez, 304 S.E.2d 875 (1983) (McHugh, J.)

"Whether evidence offered is too remote to be admissible upon the trial of a case is for the trial court to decide in the exercise of a sound discretion; and its action in excluding or admitting the evidence will not be disturbed by the appellate court unless it appears that such action amounts to an abuse of discretion." Syllabus point 5, *Yuncke v. Welker*, 128 W.Va. 299, 36 S.E.2d 410 (1945).

However, the Supreme Court, citing *State v. Yates*, 21 W.Va. 761 (1883), elaborated upon the remoteness issue as follows:

This Court, in dealing with this subject, has said that an abuse of discretion is more likely to result from excluding, rather than admitting, evidence that is relevant but which is remote in point of time, place and circumstances, and that the better practice is to admit whatever matters are relevant and leave the question of their weight to the jury, unless the court can clearly see that they are too remote to be material. *Yuncke v. Welker*, 128 W.Va. 299, 311-12, 36 S.E.2d 410 at 416 (1945).

The Court noted that in M. Marshall, J. Fitzhugh and J. Helvin, *The Law of Evidence in Virginia and West Virginia*, § 75 (Michie 1954), it is stated:

When the question is one of the remoteness of offered evidence, the decision is necessarily largely within the trial court's discretion, although this discretion is not unbounded, but must be governed by sound legal principles. However, in Virginia and West Virginia, so jealously is the jury's province guarded by the careful separation of the functions of judge and jury that, if the evidence tends even slightly to prove a fact from which a fact in issue may be inferred, it will generally be admitted, the weight to be given it being left to the jury.

The language from *The Law of Evidence in Virginia and West Virginia* was quoted with approval in *Poe v. Pittman*, 150 W.Va. 179, 193-94, 144 S.E.2d 671, 681 (1965). Furthermore, the Court found that in *Arbogast v. Vandevander*, 245 S.E.2d 620, 621 (1978), it was stated that "[r]emoteness usually goes to the weight rather than the admissibility of evidence . . ." .

EVIDENCE

Reputation for truth and veracity

State v. Zaccagnini, 308 S.E.2d 131 (1983) (Miller, J.)

The defendant alleged the trial court erred in refusing to allow him to put on witnesses who would testify as to his reputation for truth and veracity. During the trial, defendant denied delivering LSD to the undercover agent. Defendant contends that the State's evidence contradicted this testimony and that the contradiction, in effect, impeached his reputation for truth and veracity.

Syl. pt. 6 - Although a witness' testimony has been contradicted by testimony from another witness, this does not mean that his reputation for truth and veracity has been impeached, such that there is an automatic right to put on character witnesses to testify in the issue of truth and veracity.

The Supreme Court found that the issue, while committed to the discretion of the trial judge, is to be evaluated in light of the totality of the circumstances. They found that the fact that the defendant denied committing the crime does not alone bring on a right to have character witnesses to testify as to his truth and veracity, but that a different result may be warranted where the State on cross relentlessly pursues the defendant with questions designed to force him to continually acknowledge that his testimony was in conflict with that of the State's witnesses.

The Supreme Court found no abuse of discretion here. On direct, defendant stated he had never seen LSD until after he was arrested. On cross, he stated the informant had lied when he testified he had bought LSD from the defendant. The matter was not pursued by the prosecutor.

Scientific tests

State v. Bennett, 304 S.E.2d 28 (1983) (Per Curiam)

The appellant contended the trial court erred in permitting a police officer to testify that the substance he examined was marijuana and to state its weight.

EVIDENCE

Scientific tests (continued)

State v. Bennett, (continued)

Applying the standard set forth in *State v. Hood*, found in *State v. Parks*, 243 S.E.2d 848 (W.Va. 1978), under this topic in the main text, the Supreme Court found that a careful and proper foundation was laid for the admission of the officer's opinion and that the trial court correctly permitted him to testify that the substance was marijuana. Furthermore, the Supreme Court found that since appellant was merely charged with delivery of "a quantity of" marijuana, the actual amount sold was not material to his conviction under the indictment and he could not have been prejudiced by this testimony.

State v. Wyant, 328 S.E.2d 174 (1985) (Per Curiam)

Appellant was convicted of first degree murder. He contends the trial court erred in allowing the State to introduce at trial evidence of the results of scientific tests performed on the block of wood alleged to have been the murder weapon. A trooper testified she performed a chemical test on the wood which revealed the presence of blood, although she was unable to tell by further analysis whether the blood was human. She testified she had performed a microscopic examination of hairs removed from the same area of the wood where the bloodstains appeared and containing traces of the blood, and had concluded that they were human head hairs. She testified that a comparison of these specimens with a known sample of the victim's hair showed that the hairs taken from the wood were microscopically consistent with those of the victim and could have come from her. She further testified she could not positively identify that the hair on the alleged murder weapon as having com from the victim since ordinarily there are not enough unique characteristics in hair from which to determine positively that an unknown specimen came from a particular person to the exclusion of all other individuals.

The appellant initially contends this testimony was inadmissible because the State made no showing that the tests conducted were based on a generally accepted scientific principle. The Court noted they held in *State v. Clawson*, 270 S.E.2d 659 (W.Va. 1980) that such a showing, which goes to the accuracy and reliability of expert testimony as to the results of scientific tests, unless the tests have been so widely used over a period of time such that

EVIDENCE

Scientific tests (continued)

State v. Wyant, (continued)

judicial notice can be taken of their acceptance in the scientific community. The Court found the appellant offered no objection at trial on this ground, and that they therefore need not review this assignment on appeal.

The appellant did object on the ground the evidence was irrelevant since the trooper could not testify with a reasonable degree of certainty that the hair and blood found on the wood belonged to the victim. The Court found this issue relates to the weight to be given the evidence, rather that bearing upon its admissibility.

Sexual conduct

State v. Pancake, 296 S.E.2d 37 (1982) (Harshbarger, J.)

Our rape shield law permits admission of "specific instances of the victim's prior sexual conduct with the defendant . . . on the issue of consent, provided that such evidence heard first out of the presence of the jury is found by the judge to be relevant."

If evidence about a victim's other sexual activity is found to be relevant, it is inadmissible. Defendant, therefore, would have no right, constitutional or otherwise, to cross-examine about it. The problem here arose because the trial court permitted the defendant to testify about his former sexual relations with the victim but did not permit the victim to be cross-examined on it. The Supreme Court found that although the court could have properly excluded such evidence, the defendant got this fact into evidence and was not prejudiced or harmed.

State v. Peyatt, 315 S.E.2d 574 (1983) (McHugh, J.)

The appellant was convicted of incest, first degree sexual assault and third degree sexual assault. The indictment was based upon the allegations of the appellant's daughter who claimed the appellant had frequently engaged in sexual intercourse with her from the time of her fourth birthday until she was approximately twelve.

EVIDENCE

Sexual conduct (continued)

State v. Peyatt, (continued)

At trial the prosecution introduced expert medical evidence that the victim's "hymen was obliterated. It look[ed] like that of a married woman." The victim testified the only penis she had ever seen was the appellant's. The defense attempted to introduce evidence that the victim had been sexually promiscuous with other males in order to rebut the inference raised by the prosecution's medical expert that the appellant was responsible for her "obliterated " hymen. This contention was supported by the testimony of the victim's siblings, her mother and the appellant.

The appellant contended the trial court violated his rights under the confrontation clause of the Sixth Amendment and art. III, § 14 when it refused to allow the appellant to introduce evidence of the victim's past sexual behavior under the W.Va. rape shield statute, Code 61-83-12 (1976). The appellant argued he should have been allowed to introduce evidence of the victim's sexual promiscuity with other males to rebut the inference of the medical expert and to impeach the victim's credibility with respect to her statements about never having seen any male sexual organs other than her father's.

The Supreme Court found that although subsection (b) of the rape shield law does not make specific references to a trial court reviewing the admissibility of impeachment evidence out of the presence of the jury, as required by subsection (a) on the issue of consent, the trial court in this case held a series of *in camera* hearings throughout the trial to determine the nature and relevancy of the evidence the appellant sought to introduce. The appellant and his wife testified at the *in camera* hearing that the victim's siblings told them of sexual activities by the victim with certain males. The siblings revealed names but their testimony relating to the activities was unclear regarding sexual intercourse. The Supreme Court found the appellant should have subpoenaed the males in question if he wanted to pursue the issue. The Court found under the circumstances the trial court did not abuse its discretion when it excluded such evidence from the jury.

EVIDENCE

Statements by accused upon legal examination

State v. Fairchild, 298 S.E.2d 110 (1982) (McGraw, J.)

See SELF-INCRIMINATION - STATEMENTS BY DEFENDANT Statements made upon legal examination, (p. 488) for discussion of topic.

Statements made by parties in judicial proceedings

Lotz v. Atamaniuk, 304 S.E.2d 20 (1983) (Harshbarger, J.)

The Supreme Court noted that statements made by parties in the course of judicial proceedings may be "judicial admissions."

29 Am.Jr.2d *Evidence* §§ 597 and 615. They found that statements in verified pleadings clearly are within that rubric. Although they are not conclusive in a subsequent proceeding between the same parties (or as here, their representatives), they are admissible and may be given whatever evidentiary weight the trier of fact deems appropriate. 9 Wigmore on Evidence (3d Edition) § 2593; Annot., Admissibility as evidence of pleading as containing admissions against interest, 90 A.L.R. 1393 (1934 and later case service); 29 Am.Jur.2d *Evidence* §§ 687 and 695.

Tape recording

State v. Clements, 334 S.E.2d 600 (1985) (Brotherton, J.)

Appellant contends the trial court improperly admitted a tape recording of an interview of the appellant by police. He contends the tape did not meet three of the requirements for admissibility set out by the Court in *State v. Harris*, 286 S.E.2d 251 (W.Va. 1982). Specifically, appellant alleges there were changes and deletions to the recording, that all speakers were not identified and that there was no showing of voluntariness.

The Court found as to the appellant's contentions there were additions and deletions to the record, there was no objection made to this effect at trial and the allegation was therefore not before the Court on appeal.

EVIDENCE

Tape recording (continued)

State v. Clements, (continued)

As to the appellant's contention that all speakers were not identified, the Court found the record reflects the principle speakers were identified by a lieutenant, although some unidentified children were crying in the background. The Court found a reasonable reading of *State v. Harris* requires only that the principal speakers be identified, not necessarily every noise. The Court found that requirement was satisfied in this case.

The Court found there was a showing of voluntariness in the record since appellant agreed to continue to talk with police officers.

Treatises

Thornton v. Pushkin, 305 S.E.2d 316 (1983) (Miller, J.)

See EVIDENCE Expert witness, Treatises, (p. 163) for discussion of topic.

Value of stolen property

State v. Hall, 298 S.E.2d 246 (1982) (McHugh, J.)

"[N]ormally the owner of stolen property may testify as to its value because he is deemed qualified to give an opinion concerning the value of the things which he owns . . ." *State v. Cokley*, 226 S.E.2d 40 (W.Va. 1976).

An owner's testimony concerning the value of his stolen property is not the sole determinative factor but rather is but one piece of evidence which the jury may consider when establishing the property's value.

Here, proper foundations were laid by the prosecution and the testimony regarding value given by the owners was not improper. Appellant had the opportunity to thoroughly cross-examine each respective owner concerning the value of the stolen items, but he chose not to do so. Appellant also could have offered evidence of his own concerning the stolen property's value, but again he chose not to do so. The Supreme Court found it was not error for the owners to testify concerning the value of their stolen property.

EVIDENCE

Value of stolen property (continued)

State v. Jacobs, 298 S.E.2d 836 (1982) (Per Curiam)

See BREAKING AND ENTERING Value of stolen property, (p. 51) for discussion of topic.

Victim-character and reputation

State v. Louk, 301 S.E.2d 596 (1983) (Harshbarger, J.)

The defendant was tried for first degree murder and felonious assault. The trial court refused to admit various testimony about one victim's army records and both victims' criminal convictions and quarrelsome, violent natures.

Applying the standard set forth in syl. pt. 1, *State v. Hardin*, 112 S.E. 401 (W.Va. 1922), see *State v. Gwinn*, (found in Vol. I under this topic.), the Supreme Court found a defendant must know about the specific violent or unlawful acts of a decedent, and so, evidence about what events that happened after the alleged crime, which could not have contributed to defendant's fearful state of mind at the time she defended herself, was properly excluded.

Rulings on the admissibility of evidence are largely within a trial court's sound discretion and should not be disturbed unless there has been an abuse of discretion. Syl. pt. 2, *State v. Rector*, 280 S.E.2d 597 (1981), syl. pt. 5, *Casto v. Martin*, 230 S.E.2d 722 (1976). The Supreme Court did not find abuse here. In footnote 3, the Supreme Court noted the trial court's decision not to admit a psychiatrist's testimony about the defendant's capability to form malicious intent would be reversed for the same reason.

EXTRADITION

See DETAINER, (p. 106).

In general

Cronauer v. State, 322 S.E.2d 862 (1984) (McHugh, J.)

Syl. pt. 1 - "In habeas corpus proceedings instituted to determine the validity of custody where petitioners are being held in connection with extradition proceedings, the asylum state is limited to considering whether the extradition papers are in proper form; whether there is a criminal charge pending in the demanding state; whether the petitioner was present in the demanding state at the time the criminal offense was committed; and whether the petitioner is the person named in the extradition papers. "Syl. Pt. 2, *State ex rel. Mitchell v. Allen*, 155 W.Va. 530, 185 S.E.2d 355 (1971), *cert denied*, 406 U.S. 946 (1972).

Challenging proceedings

***State v. Flint*,** 301 S.E.2d 765 (1983) (McHugh, J.)

The appellant alleged the trial court erred in denying his motion to dismiss the charge of murder against him because he was extradited from Nevada to West Virginia without benefit of counsel.

Syl. pt. 4 - Once a fugitive has been brought within the jurisdiction of West Virginia as the demanding state, the propriety of the extradition proceedings which occurred in the asylum state may not be challenged. The extradition proceedings may be challenged only in the asylum state.

Once a defendant has been extradited to this state "the method of [the defendant's] return, even though illegal or forcible, does not invalidate this conviction . . .under the due process clause of the Fourteenth Amendment." *State ex rel. Sublett v. Adams*, 145 W.Va. 354, 115 S.E.2d 158 (1960), *cert denied*, 366 U.S. 933, 81 S.C. 1652, 6 L.E.2d 392 (1961).

EXTRADITION

Habeas corpus

Brightman v. Withrow, 304 S.E.2d 688 (1983) (Miller, J.)

See EXTRADITION Time within which to arrest, (p. 201) for discussion of topic.

Prompt presentment to a magistrate

State v. Guthrie, 315 S.E.2d 397 (1984) (Harshbarger, J.)

The Supreme Court noted the extradition law provides that a justice or judge shall issue a warrant directing a peace officer to arrest a person charged with an offense in another State, if a credible person comes before the judicial officer and swears to an affidavit. The arrestee must be brought before any judge or magistrate in the harboring State to answer the complaint and the affidavit.

Sufficiency of rendition warrant

Cronauer v. State, 322 S.E.2d 862 (1984) (McHugh, C.J.)

Syl. pt. 2 - A rendition warrant issued by the Governor of this State under *W.Va. Code*, 5-1-8(a) [1937], in response to a request for extradition from the executive authority of a demanding state pursuant to the Uniform Criminal Extradition Act, *as amended*, *W.Va. Code*, 5-1-7 to 5-1-13, "substantially recite[s] the facts necessary to the validity of its issuance" with respect to the crime charged therein, as required by *W.Va. Code*, 5-1-8(a) [1937], if the rendition warrant contains a statement that gives the person sought to be extradited reasonable notice of the nature of the crime charged in the demanding state; and a circuit court, when determining the sufficiency of a rendition warrant in a habeas corpus proceeding challenging the validity of custody in connection with extradition proceedings, may examine underlying documents filed by the demanding state in support of its request for extradition.

EXTRADITION

Time within which to arrest

Brightman v. Withrow, 304 S.E.2d 688 (1983) (Miller, J.)

The relator contended that because he was not arrested on the Governor's warrant for his extradition ninety days after he was originally arrested and detained on a fugitive warrant, the State was barred from proceeding further on the extradition.

Here, the relator was incarcerated in West Virginia under a fugitive warrant charging that he was a fugitive from justice from Florida. He was taken before the circuit court and the court ordered that he be confined for ninety days to allow time for his arrest under a rendition or extradition warrant from the Governor of West Virginia. The ninety day period expired and the Governor's warrant had not been issued. Relator filed a petition for a writ of habeas corpus with the circuit court. After the filing of the petition, but before the hearing, the Governor's warrant was issued. At the hearing, the circuit court ordered relator released from custody. Immediately following the hearing a deputy sheriff who had received the rendition warrant from the Governor's office, rearrested the relator and took him back into the courtroom to answer the warrant.

The Supreme Court found the circuit court was correct in finding that the relator was entitled to release from custody when the ninety-day period expired, and was also correct in determining that the state could properly arrest him on the Governor's warrant.

Syl. pt. - Under the provisions of *W.Va. Code*, 5-1-9, a fugitive arrested under a fugitive warrant in this state is entitled to release from custody after ninety days unless the Governor's extradition warrant has been issued and executed. However, upon his release such person remains a fugitive subject to rearrest on the Governor's warrant if he remains within this state.

FALSE SWEARING

Sufficiency of evidence

Lawful administration of oath

State v. Wade, 327 S.E.2d 142 (1985) (McHugh, J.)

The appellant contends the State did not prove beyond a reasonable doubt that the appellant's oath was administered by a person lawfully authorized to do so. At trial a witness testified he observed the appellant being sworn before testifying at the hearing and that the chief deputy circuit clerk of the county had administered the oath. The State also introduced the transcript of the hearing which indicated the appellant was sworn prior to testifying at the hearing. The Supreme Court found the State met its burden through the witness and that *W.Va. Code*, 57-5-9 (1945), empowers a clerk of the circuit court to administer oaths as required by law. The Court found Code 6-3-1(a)(1) provides for the appointment of deputy clerks and allows for such clerks to perform the duties of the principal.

The Court found there was sufficient evidence on this point.

Sufficiency of information

State v. Wade, 327 S.E.2d 142 (1985) (McHugh, J.)

Syl. pt. 1 - A "lawfully administered" oath or affirmation is an essential element of the crimes of perjury, *W.Va. Code*, 61-5-1 [1931], and false swearing, *W.Va. Code*, 61-5-2 [1931]; and a "lawfully administered" oath or affirmation, as that phrase is used in *W.Va. Code*, 61-5-1 [1931], and *W.Va. Code*, 61-5-2 [1931], is an oath or affirmation authorized by law and taken before or administered by a tribunal, officer or person authorized by law to administer such oaths or affirmations.

Syl. pt. 2 - As a general rule, under *W.Va.R.Crim.P.* 7(c)(1), the body, charge or accusation contained in an information is to be judged by the same standards that determine the sufficiency of the body, charge or accusation of an indictment.

Syl. pt. 3 - "An indictment [or information] for a statutory offense is sufficient if, in charging the offense, it substantially follows the language of the statute, fully informs the accused of the particular offense with which he

FALSE SWEARING

Sufficiency of information (continued)

State v. Wade, (continued)

is charged and enables the court to determine the statute on which the charge is based." Syl. pt. 3, *State v. Hall*, 304 S.E.2d 43 (W.Va. 1983).

The Supreme Court found although the legal authorization of the person who administers the oath is part of the proof of a "legally administered" oath or affirmation for purposes of prosecuting the crimes of perjury and false swearing, it is a question of fact to be decided by a jury and is not essential to the sufficiency of an indictment or information charging the crimes of perjury or false swearing under our statutes. The Court found that the trial court did not err when it denied the appellant's motion to dismiss both counts of the information.

GRAND JURY

Improper evidence submitted to

State v. Clements, 334 S.E.2d 600 (1985) (Brotherton, J.)

See INDICTMENT Dismissal, Improper evidence before grand jury, (p. 260) for discussion of topic.

Probable cause to indict

State ex rel. Hamstead v. Dostert, 313 S.E.2d 409 (1984) (McGraw, J.)

See GRAND JURY Prosecutor's role, (p. 204) for discussion of topic.

Procedural irregularity

State v. Howerton, 329 S.E.2d 874 (1985) (Miller, J.)

Appellant alleged the trial court erred in refusing to dismiss the indictment against him on the basis that there was no prior written order summoning the special grand jury. The trial court failed to enter a written order directing the jury commissioners to select the special grand jury. The Supreme Court found the trial court properly held that under the circumstances, the lack of an order did not validate the indictment.

Prosecutor's role

State ex rel. Hamstead v. Dostert, 313 S.E.2d 409 (1984) (McGraw, J.)

Syl. pt. 1 - With the respect to the determination of whether to seek an indictment and what indictment will be sought in a particular case, the probable cause standard represents the line of demarcation between prosecutorial discretion and prosecutorial duty.

Syl. pt. 2 - While a circuit court has supervisory powers over grand jury proceedings to preserve the integrity of the grand jury process and to ensure the proper administration of justice, it may not prohibit grand jury consideration of offenses within any particular class of crimes.

Prosecutor's role (continued)

State ex rel. Hamstead v. Dostert, (continued)

Syl. pt. 3 - Absent an abuse of discretion, judicial interference with the exercise of prosecutorial judgement as to what charge to bring to a criminal prosecution is impermissible.

The Supreme court found that if a citizen or a circuit judge believes, had reason to believe, or knows that probable cause exists to charge an individual with the commission of a particular crime, and also believes, has reason to believe, or knows that the prosecutor is failing to perform his non-discretionary duty to act upon this probable cause, such citizen or circuit judge may seek by writ of mandamus to compel the prosecutor to perform his nondiscretionary duties.

The Court found a complainant circuit judge must follow the procedures contained in Rule XVII of the West Virginia Trial Court Rules for Courts of Record (1983 Supp.) for the appointment of another circuit judge to hear the mandamus petition.

Syl. pt. 4 - If a circuit judge desires to intervene in the relationship of a grand jury and a prosecutor, in the absence of a proper complaint by a concerned citizen, he can do so by bringing a disqualification motion under West Virginia Code § 7-7-8 (1976 Replacement Vol.).

Syl. pt. 5 - When a circuit judge is the moving party in the attempted disqualification of a prosecuting attorney under West Virginia Code § 7-7-8 (1976 Replacement Vol.), he should disqualify himself under Canon 3C(1) of the West Virginia Judicial Code of Ethics (1982 Replacement Vol.), and follow the procedures contained in Rule XVII of the West Virginia Trial Court Rules for Courts of Record (1983 Supp.) for the appointment of another circuit judge to hear the disqualification motion.

Role of citizen

State ex rel. Hamstead v. Dostert, 313 S.E.2d 409 (1984) (McGraw, J.)

See GRAND JURY Prosecutor's role, (p. 204) for discussion of topic.

GRAND JURY

Role of court

***State ex rel. Hamstead v. Dostert*,** 313 S.E.2d 409 (1984) (McGraw, J.)

See GRAND JURY Prosecutor's role, (p. 204) for discussion of topic.

Selection

State v. Pancake, 296 S.E.2d 37 (1982) (Harshbarger, J.)

W.Va. Code 52-1-3 and 52-2-2 requires that a county circuit court appoint two jury commissioners from opposite political parties.

Only one of the two lawfully appointed jury commissioners was present at the February term grand jury selection. The Supreme Court found if the presence of both commissioners is mandatory, the indictment is void. If directory, the defendant must show harm or prejudice.

The Supreme Court found the presence of two dully appointed commissioners to prepare the jury list is mandatory, but there was no allegation that the list was improperly compiled. All other steps set out in the statute are directory. The random selection of ballots from a properly constituted grand jury list by one jury commissioner in the presence of the court's clerk substantially compiled with the directory provisions of Code 52-2-2 and the defendant did not allege or demonstrate any prejudice. The indictment was found to be good.

"It should be emphasized that in holding that the grand jury which returned the indictment against the petitioner was a lawfully constituted grand jury and that the indictment was not vitiated by any irregularity in its selection, this Court does not overlook or sanction the neglect upon the part of the jury commissioners in failing to perform strictly, fully and promptly the duty imposed upon them by the statute. On the contrary their apparent indifference and their careless action are expressly disapproved. Extreme care should be exercised to comply strictly with all the requirements of the statute by all who are charged with that duty and even a technical of harmless disregard of such requirements should be scrupulously avoided." *State ex rel. Mynes v. Kessel*, 152 W.Va. 37, 158 S.E.2d 896 (1968).

GRAND JURY

Witnesses

Refusal to testify

In re Yoho, 301 S.E.2d 581 (1983) (Harshbarger, J.)

See CONTEMPT Refusal to testify before grand jury, (p. 68) for discussion of topic.

GUILTY PLEAS

Competency to enter guilty plea

State v. Cheshire, 313 S.E.2d 61 (1984) (Per Curiam)

See CONTEMPT To stand trial, (p. 58) for discussion of topic.

Ineffective assistance

State v. Cecil, 311 S.E.2d 144 (1983) (McHugh, J.)

The appellant plead guilty to murder of the first degree and sexual abuse in the first degree. Appellant contended his counsel was ineffective because he gave the appellant no recommendation concerning the appellant's plea of guilty to murder of the first degree.

Applies standard set forth in syl. pt. 3, *State v. Sims*, 162 W.Va. 212, 248 S.E.2d 834 (1978). (Found in Vol. I under this topic.)

The Supreme Court found the record in this case was sufficient to sustain the determination of the trial court that the appellant's pleas of guilty to both sexual abuse in the first degree and murder in the first degree were voluntarily and intelligently made. The Court found no evidence of ineffective assistance of counsel, within the meaning of *Sims*.

Tucker v. Holland, 327 S.E.2d 388 (1985) (McGraw, J.)

See INEFFECTIVE ASSISTANCE Guilty plea, (p. 277) for discussion of topic.

State v. Finney, 328 S.E.2d 203 (1985) (Per Curiam)

See INEFFECTIVE ASSISTANCE Guilty plea, (p. 278) for discussion of topic.

GUILTY PLEAS

Pre-sentence investigation prior to entry of plea

State ex rel. Simpkins v. Harvey, 305 S.E.2d 268 (1983) (McGraw, J.)

The petitioner was indicted fro driving under the influence of alcohol and causing the death of another person in violation of Code 17C-5-2(a). Prior to entering his guilty plea to the charge, petitioner requested a presentence investigation report be prepared to aid the court in deciding whether petitioner should be released on probation or confined in a youthful male offender center. The trial court denied the request, reasoning that Code 17-5-2 provides for mandatory penitentiary sentence and that a presentence investigation would therefore serve no purpose.

The Supreme Court found that under our rules of criminal procedure, a plea bargain agreement must be disclosed in open court at the time the plea is offered. The agreement is subject to approval by the court which may accept the agreement and embody it in the judgement and sentence to be imposed, reject the agreement and afford the defendant an opportunity to then withdraw his plea, or defer its decision as to acceptance or rejection until there has been an opportunity to consider the presentence report. A defendant cannot compel performance of a plea bargain agreement unless he enters a plea of guilty or otherwise acts to his substantial detriment in reliance on the agreement.

The Court found that our law has long provided for a presentence investigation to aid the trial court in determining the propriety and conditions of a criminal defendant's release on probation. *See W.Va. Code* § 62-12-7 (1939). Pursuant to statute, the report of the presentence investigation is required to include information concerning the offender's court and criminal record, occupation, family background, education, habits and associations, mental and physical condition, as well as information concerning the offender's dependants and other relevant facts. *Id.* A presentence investigation is required to be made "[w]hen directed by the court," and no person convicted of a felony may be released on probation until a report of the investigation "has been presented to and considered by the court." *Id.*

The statutory requirements have been substantially incorporated in our rules of criminal procedure, Rule 32(c). The Court noted that although Rule 32 does not prohibit a presentence investigation prior to the entry of a plea, neither does it *require* that an investigation be made prior to the entry of a plea.

GUILTY PLEAS

Pre-sentence investigation prior to entry of plea (continued)

State ex rel. Simpkins v. Harvey, (continued)

The Supreme court found in this case that apparently, the petitioner had yet to enter a plea to the charges against him, and consequently, he possessed no clear legal right to the relief he sought to compel. The petitioner is entitled, at the time his plea is offered, to disclosure of any plea agreement reached by the parties, and its consideration by the trial court, without the interjection of new conditions by the court. See *State ex rel. Roark v. Casey*, 286 S.E.2d 702 (W.Va. 1982); *W.Va.R.Crim.P.* 11(e). After entry of plea, the trial court is required to order a presentence investigation unless the defendant waives the investigation, or the court determines on the record that an investigation and report is unnecessary to enable the meaningful exercise of sentencing discretion. *W.Va.R.Crim.P.* 32(c)(1). However, a criminal defendant is not entitled by law to compel a presentence investigation prior to the entry of a plea. Accordingly, the Court denied the writ.

Voluntariness of plea

Adkins v. Dale, 299 S.E.2d 871 (1982) (Per Curiam)

The relator alleged his plea of guilty to probation violation was based upon an invalid plea bargain and was therefore not voluntarily entered.

The relator entered a plea of guilty to grand larceny and was placed on probation. While on probation, he was charged with three misdemeanors which constituted violation of the terms of his probation. He entered pleas of guilty to all three. A probation revocation hearing was held, and at this hearing the relator and his counsel discussed with the prosecutor an ongoing burglary investigation in which the relator was suspect. This conversation was the basis of the relator's claim that a plea bargain was reached.

The relator entered a plea of guilty to probation violation. The prosecutor decided to prosecute the relator on the burglary charges. The relator, in this habeas, made two assignments of error, both premised upon his contention that some promise or representation by the state induced him to enter a plea of guilty to probation violation.

Voluntariness of plea (continued)

Adkins v. Dale, (continued)

The Supreme Court found that it was apparent from the circumstances that the entry of the guilty plea was not induced by a belief that any promises had been made by the prosecutor with regard to the burglary charges, and that the relator failed to prove his plea was entered involuntarily. The writ was denied.

HABEAS CORPUS

Burden of proof

Stanley v. Dale, 298 S.E.2d 225 (1982) (Per Curiam)

In habeas corpus proceedings, except for "assistance of counsel" cases, the petitioner has the burden of proof; the degree of proof is by a preponderance of the evidence.

Cruel and unusual punishment

Hackl v. Dale, 299 S.E.2d 26 (1982) (Miller, C.J.)

Applies standard set forth in syl. pt. 1, *State ex rel. Pingley v. Coiner*, 155 W.Va. 591, 186 S.E.2d 220 (1972). See *State ex rel. K.W. v. Werner*, 242 S.E.2d 907 (W.Va. 1978). (Found in Vol. I under PRISON CONDITIONS Cruel and unusual punishment, Remedy.)

Hickson v. Kellison, 296 S.E.2d 855 (1982) (Miller, C.J.)

Applies standard set forth in syl. pt. 1, *State ex rel. Pingley v. Coiner*, 155 W.Va. 591, 186 S.E.2d 220 (1972). See *State ex rel. K.W. v. Werner*, 242 S.E.2d 907 (1978). (Found in Vol. I under PRISON CONDITIONS Cruel and unusual punishment, Remedy.)

Discovery

Gibson v. Dale, 319 S.E.2d 806 (1984) (McGraw, J.)

The trial court refused to consider the merits of the appellant's claims on the ground he had waived them by failing to assert them in a previous habeas corpus proceeding. The Supreme Court found the circuit court erred in so ruling. (See HABEAS CORPUS Exhaustion of remedy, (p. 213)). The appellant also contends the trial court erred in denying his motion to produce, inspect and copy all police reports pertaining to the crime in which he was convicted.

HABEAS CORPUS

Discovery (continued)

Gibson v. Dale, (continued)

The Supreme Court found the court to which a motion for production of documents or records is addressed in a habeas proceeding should exercise flexibility in ruling on the motion. Where the petitioner can demonstrate that materials in possession of the State contain relevant evidence which would enable him to prove specific allegations entitling him to relief, the court should grant the motion.

The Supreme Court found in this case the appellant did not state how the police reports were necessary for a proper resolution of the issues raised in his petition. The Court could not conclude the trial court abused its discretion in denying the motion for production of the police reports.

Exhaustion of remedy

Gibson v. Dale, 319 S.E.2d 806 (1984) (McGraw, J.)

The issue in this case is whether or not the circuit court erred in finding the appellant had waived consideration of the issues raised in his petition below by his failure to assert them in the course of a habeas corpus proceeding held in 1977.

Syl. pt. 1 - Our post-conviction habeas corpus statute, *W.Va. Code* § 53-4A-1 *et seq.* (1981 Replacement Vol.), clearly contemplates that a person who has been convicted of a crime is ordinarily entitled, as a matter of right, to only one post-conviction habeas corpus proceeding during which he must raise all grounds for relief which are known to him or which he could, with reasonable diligence, discover.

Syl. pt. 2 - *W.Va. Code* § 53-4A-1 *et seq.* (1981 Replacement Vol.) contemplates a knowing and intelligent waiver, in the vein of a waiver of a constitutional right, which cannot be presumed from a silent record. Before the failure to advance contentions in a habeas corpus proceeding will bar their consideration in subsequent applications for habeas corpus relief, the record must conclusively demonstrate that the petitioner voluntarily refrained from asserting known grounds for relief in the prior proceeding.

HABEAS CORPUS

Exhaustion of remedy (continued)

Gibson v. Dale, (continued)

Applies standard set forth in syl. pt. 1, *Losh v. McKenzie*, 277 S.E.2d 606 (W.Va. 1981). Found in Vol. I under HABEAS CORPUS Omnibus hearing.

The Supreme Court found the circuit court erred in refusing to consider the merits of the appellant's claims on the ground he had waived them by failing to assert them in the previous habeas proceeding. The Court found the record of the 1977 hearing did not demonstrate a knowing and intelligent waiver of those grounds for relief, that the only evidence presented at the hearing mitigates in the appellant's favor, and that the record does not indicate the appellant was afforded an omnibus hearing in the course of the previous habeas corpus proceeding.

The Court noted that comprehensive standards for the conduct of an omnibus post-conviction habeas corpus hearing did not exist at the time of the appellant's first habeas proceeding, but the principles set forth in *Losh* had been announced over nine months before the subsequent hearing was held. The Court found the lower court was required to resolve the waiver question in accordance with those principles.

Omnibus hearing

Gibson v. Dale, 319 S.E.2d 806 (1984) (McGraw, J.)

See HABEAS CORPUS Exhaustion of remedy, (p. 213) for discussion of topic.

Procedure

Adams v. Circuit Court of Randolph County, 317 S.E.2d 808 (1984) (Miller, J.)

Petitioner executed a notarized petition for a writ of habeas corpus on April 14, 1983. The petition was sent to the office of the circuit judge of Randolph County since petitioner was incarcerated in Huttonsville. The petition was

Procedure (continued)

Adams v. Circuit Court of Randolph County, (continued)

received by the circuit clerk's office from the circuit judge's office on December 14, 1983. The following day the circuit judge transferred the case to the Circuit Court of Wayne County where petitioner had been convicted. The record does not reveal when the petition was received by the Randolph County Circuit Judge. The Supreme Court noted it appeared the petition was not acted upon for a considerable period of time, and the judge in Randolph County only transferred the petition. Petitioner seeks a mandamus to compel the Circuit Court of Randolph County to rule on his petition.

Syl. pt. 2 - Under *W.Va. Code*, 53-4A-3(b), the court receiving a writ of habeas corpus has three choices as to where to return the writ: "before (i) the court granting it, (ii) the circuit court, or a statutory court, of the county wherein; the petitioner is incarcerated, or (iii) the circuit court, or the statutory court, in which, as the case may be, the petitioner was convicted and sentenced."

Syl. pt. 3 - Given the office and function of the writ of habeas corpus, a circuit court should act with dispatch. Accordingly, a circuit court must transfer habeas corpus applications promptly, if transfer is appropriate. If ti does not make a prompt transfer, it is required to render a decision on the merits of the writ.

The Supreme Court found the circuit court failed to act within a reasonable time in this case and having failed to act promptly, should not have transferred the case to the court of conviction. The Court found since the petition raised purely legal issues, the Circuit Court of Randolph County could have ruled on it.

Syl pt. 4 - Evidentiary hearings are not required in a habeas corpus proceeding when only purely legal issues are raised which do not involve disputed issues of fact.

The Court found that since there had been an unreasonable delay and since they had the petition, they would resolve the issues presented.

See PAROLE Discretion of parole board (p. 393).

HABEAS CORPUS

When a hearing must be held

Gibson v. Dale, 319 S.E.2d 806 (1984) (McGraw, J.)

The trial court refused to consider the merits of the appellant's claim on the ground he had waived them by failing to assert them in a previous habeas corpus proceeding. The Supreme Court found the trial court erred in so ruling. (See HABEAS CORPUS Exhaustion of remedy, (p. 213)). The appellant also contends on remand the circuit court should be ordered to conduct a full evidentiary hearing on the contentions raised.

The Supreme Court found the posy-conviction habeas corpus statute leaves the decision of whether to conduct an evidentiary hearing in large part to the sound discretion of the court before which the writ is made returnable.

The Court found where the allegations show reason to believe the petitioner may be able to demonstrate he is confined illegally, the court has a duty to provide the necessary facilities and procedures for an adequate inquiry.

Syl. pt. 5 - A habeas corpus petitioner is entitled to careful consideration of his grounds for relief, and the court before which the writ is made returnable has a duty to provide whatever facilities and procedures are necessary to afford the Circuit Court Kanawha County. An attorney, Orville Hardman, was retained to represent the appellant in the proceedings in the circuit court. An evidentiary hearing was conducted on December 19,1977, and, by order entered February 14, 1978, the appellant's prayer for relief was denied.

The Court found whether or not a petitioner is entitled to a full evidentiary hearing depends on whether or not the petitioner has had a full and fair hearing at some stage of the proceeding with regard to the contentions raised. If the facts were fully developed on record, the court may rule on the merits by reference to those facts. If the facts given rise to the petitioner's contentions have never been fully developed the court should afford full opportunity for presentation of the relevant facts.

Here, the circuit court never reached the issue of whether or not the petitioner was entitled to an evidentiary hearing since the judge disposed of the case on the waiver issue. The Supreme Court left to the discretion of the trial court on remand the question of whether or not a full hearing should be conducted on the issues raised.

HARMLESS ERROR

Burden shifting instructions

State v. Thayer, 305 S.E.2d 313 (1983) (Per Curiam)

See SELF-DEFENSE Instructions, (p. 480) for discussion of topic.

Constitutional

In general

State v. Sheppard, 310 S.E.2d 173 (1983) (McGraw, J.)

"Failure to observe a constitutional right constitutes reversible error unless it can be shown that the error was harmless beyond a reasonable doubt." Syllabus Point 5, *State ex rel. Grob v. Blair*, 214 S.E.2d 330 (W.Va. 1975)." Syllabus Point 5, *State v. Boyd*, 233 S.E.2d 710 (W.Va. 1977).

Absence of counsel at preliminary hearing

State v. Stout, 310 S.E.2d 695 (1983) (McHugh, J.)

See PRELIMINARY HEARING Right to counsel, (p. 409) for discussion of topic.

Evidence

State v. Gravely, 299 S.E.2d 375 (1982) (McHugh, J.)

See EVIDENCE Pre-trial identification in violation of right to counsel.

Identification

State v. Sheppard**,** 310 S.E.2d 173 (1983) (McGraw, J.)

See IDENTIFICATION Suggestive identification, Denial of right to counsel, (p. 245) for discussion of topic.

HARMLESS ERROR

Constitutional (continued)

Presence at critical stage

Arbogast v. R.B.C., 301 S.E.2d 827 (1983) (Per Curiam)

See JUVENILE Critical stage, (p. 346) for discussion of topic.

Nonconstitutional

Counsel error

State v. Cooper, 304 S.E.2d 851 (1983) (Harshbarger, J.)

See INEFFECTIVE ASSISTANCE Failure to make motions, (p. 270) for discussion of topic.

Evidence of acquittal by reason of insanity

State v. Gum, 309 S.E.2d 32 (1983) (McGraw, J.)

See WITNESSES Impeachment, Acquittal by reason of insanity, (p. 603) for discussion of topic.

Failure to disclose names of witnesses

State v. Cox, 297 S.E.2d 825 (1982) (Per Curiam)

See DISCOVERY Failure to disclose, (p. 109) for discussion of topic.

Failure to disclose rebuttal witnesses

State v. Boykins, 320 S.E.2d 134 (1984) (Per Curiam)

See WITNESSES Rebuttal, (p. 616) for discussion of topic.

HARMLESS ERROR

Non constitutional (continued)

Instructions

State v. Schaefer, 295 S.E.2d 814 (1982) (Per Curiam)

See HOMICIDE Instructions, Malice, (p. 228); HOMICIDE Instructions, Not supported by the evidence, (p. 229) for discussion of topic.

Prior convictions

State v. Tanner, 301 S.E.2d 160 (1982) (Harshbarger, J.)

See EVIDENCE Prior convictions, Impeachment of character or reputation, (p. 184) for discussion of topic.

Standard for determining

State v. Gum, 309 S.E.2d 32 (1983) (McGraw, J.)

Applies standard set forth in syl. pt. 2, *State v. Adkins*, 261 S.E.2d 55 (W.Va. 1979), cert. denied, 445 U.S. 904 (1980). (Found in Vol. I under this topic.)

HOMICIDE

Bifurcated trial

State v. Kopa, 311 S.E.2d 412 (1983) (McHugh, J.)

See HOMICIDE Instructions, mercy, (p. 229) for discussion of topic.

Bill of particulars

Principal in first or second degree

State v. Ashcraft, 309 S.E.2d 600 (1983) (McGraw, C.J.)

Appellant was convicted of first degree murder. He contended the circuit court erred by denying a portion of his motion for a bill of particulars. The information sought by the appellant would have required the State to specify whether the appellant would be prosecuted as a principal in the first or second degree.

The Supreme Court found that it did not appear that the appellant could legitimately claim prejudicial surprise as a result of nondisclosure. The Court noted it appeared from the record that the prosecutor employed an "open-file policy" and that through discovery, the appellant attempted to force the prosecution to elect one of two possible factual theories surrounding appellant's degree of involvement. The Supreme Court found that as a general rule, the resolution of factual disputes in a criminal trial is a function of the jury, not the prosecutor. The Court concluded the trial court did not abuse its discretion in denying this portion of the motion for a bill of particulars. To hold otherwise, they found, would perpetuate the meaningless distinctions the Court sought to abolish in *State v. Petry*, 273 S.E.2d 346 (W.Va. 1980). In *Petry* the Court abolished the technical distinction between principals in the first and second degree insofar as that distinction must be observed in drafting an indictment, and held that a general indictment as a principal in the first degree would be sufficient to sustain as aiding and abetting or accessory before the fact conviction.

HOMICIDE

Corpus delicti

State v. Hall, 304 S.E.2d 43 (1983) (Neely, J.)

Syl. pt. 4 - To prove the *corpus delicti* in a case of homicide two facts must be established: (1) The death of a human being and (2) a criminal agency as its cause.

Death of a victim must be proven either by direct testimony or by presumptive evidence "of the strongest kind" whereas the criminal agency may be established by circumstantial evidence or by presumptive reasoning from the adduced facts and circumstances.

Eyewitness' testimony that he saw appellant shoot five bullets into victim's head and then drive away; passerby's finding of the body; police removal of the body with five bullet holes in it from the specified place; and coroner's autopsy and identification of the body were sufficient evidence both of death and of its cause by criminal agency.

Defenses

State v. Evans, 310 S.E.2d 877 (1983) (McHugh, J.)

See DEFENSES Accidental killing, (p. 86) for discussion of topic.

Double jeopardy

State v. Clayton, 317 S.E.2d 499 (1984) (Harshbarger, J.)

See HOMICIDE Instructions, Retrial, (p. 231) for discussion of topic.

Retrial

State v. Young, 311 S.E.2d 118 (1983) (McGraw, J.)

See DOUBLE JEOPARDY Retrial, (p. 131) for discussion of topic.

HOMICIDE

Felony-Murder

Elements

State v. Young, 311 S.E.2d 118 (1983) (McGraw, J.)

The felony murder doctrine, as developed at common law, provides that where a homicide occurs in the course of, or as a result of, a separate, distinct felony, the felonious intent involved in the underlying felony may be transferred to supply the intent to kill necessary to characterize the homicide as murder.

W.Va Code 61-2-1 alters the scope of the common law felony murder doctrine by confining its application to the underlying felonies of arson, rape, robbery or burglary, or the attempt to commit these crimes. The Supreme Court also noted that they have held the felony murder rule to be constitutional.

The appellant contended the trial court erred in permitting the State to proceed under a felony murder theory in the presentation of its case when there was no mention of the underlying felony of robbery in the indictment. The appellant argued that his indictment for murder, which followed the form of *W.Va. Code* 62-2-1, failed to inform him of the State's intention to prosecute him under a felony murder theory, and that the presentation of evidence relating to robbery placed him at an unwarranted disadvantage during his retrial. He argued the trial court should have refused the State's instructions outlining the elements of the offense of robbery and the felony murder rule.

The Supreme Court found the murder indictment was sufficient to support a conviction of felony murder.

"An indictment which charges that the defendant feloniously, willfully, maliciously, deliberately, premeditatedly and unlawfully did slay, kill and murder is sufficient to support a conviction for murder committed in the commission of or attempt to commit arson, rape, robbery or burglary, it not being necessary, under *W.Va. Code* 61-2-1 to set forth the manner or means by which the death of the deceased was caused." *State v. Bragg*, 235 S.E.2d 466 (W.Va. 1977).

HOMICIDE

Felony-Murder (continued)

Elements (continued)

State v. Young, (continued)

The Supreme court also found it could not be seriously contended that the appellant had no notice of the State's intention to present evidence of robbery at trial since it appeared from the record that the first mention of the offense of robbery and of the State's felony murder theory came from defense counsel during his opening statement. The Court noted that information divulged by the State during pre-trial discovery conveyed to defense counsel its intention to present evidence of robbery at trial.

Evidence

Proof of identity of victim

State v. Wyant, 328 S.E.2d 174 (1985) (Per Curiam)

Appellant was convicted of first degree murder. He contends on appeal the State failed to prove the identity of the victim. The victim was known in the community as Hettie Fisher, but her legal name my have been Hettie King. She was named in the indictment and referred to at trial as Hettie Fisher, Hettie King and Hettie King, also known as Nettie fisher.

The Court found this is clearly not a case where the State has failed to prove the identity of the deceased. There was merely some question as to the victim's legal name. The Court found the State's efforts to insure the indictment carried the victim's legal name as well as the one by which she was commonly known and identified are laudable, though hardly necessary.

HOMICIDE

Felony murder

Instructions

State v. Manns, 329 S.E.2d 865 (1985) (Miller, J.)

See HOMICIDE Felony murder, Lesser included offense, (p. 224) for discussion of topic.

State v. Manns, 329 S.E.2d 865 (1985) (Miller, J.)

This case was tried on a felony-murder theory and the fact that the homicide occurred during the course of an attempted robbery of the victim and was essentially not disputed by the defendant. Consequently, the Supreme court found the defendant's instructions on lesser included degree of homicide and larceny in lieu of robbery were properly refused under syl. Pts. 1 and 2 of *State v. Neider*, 295 S.E.2d 902 (W.Va. 1982).

Indictment

State v. Hall, 304 S.E.2d 43 (1983) (Neely, J.)

Where the language of an indictment for murder substantially followed the language of the statute, *W.Va. Code* 61-2-1 (1923) and followed exactly the form found in the Appendix of forms attached to the *W.Va.R.Crim.P.*, it was sufficient to comply with syl. pt. 1, *State v. Fairchild*, 298 S.E.2d 110 (W.Va. 1982). (Found in Vol. I under INDICTMENT Sufficiency.)

The indictment charged the appellant with "murder in the first degree by the willful, deliberate and premeditated shooting . . .with a pistol, with intent to cause death, and causing his death . . ."

No particular form of words is required in an indictment. So long as the accused is adequately informed of the nature of the charge and the elements of the offense, the indictment is sufficient.

Indictment (continued)

State v. Hall, (continued)

While felonious intent and malice are essential elements of murder and "it is imperative that the essential elements of a crime be alleged in the indictment, absence of the words "feloniously", "maliciously", and "unlawfully" in the indictment is not necessarily a fatal defect. When those terms are replaced by "premeditated" and "murder in the first degree", "[T]he former terms are necessarily subsumed in the latter. Their inclusion by implication only will cause no prejudice to defendants protected by a constitutional right to competent counsel."

The terms of appellant's indictment adequately informed him of his jeopardy to a conviction for first degree murder. Jeopardy to lesser degrees is an inherent and natural consequence of the greater jeopardy.

Sufficiency

State v. Manns, 329 S.E.2d 865 (1985) (Miller, J.)

Appellant contends his indictment for first degree murder did not contain the word "felonious" and therefore, under *State ex rel. Reed v. Boles*, 148 W.Va. 770, 137 S.E.2d 246 (1964) and related cases, it is void and his conviction should be revoked.

The Court found they spoke to this issue in *State v. Hall*, 304 S.E.2d 43 (W.Va. 1983) where they held the indictment was sufficient without dealing with the cases that have held the absence of the words "felonious" or "feloniously" in a felony indictment renders the indictment defective. The Court found here that these cases represent an archaic and overly technical view of the sufficiency of an indictment.

Syl. pt. 2 - Where the indictment, by reference to the offense charged, including the reference to any appropriate statute, clearly indicates that the charge is a felony, the absence of the word "felonious" or words of like import will not render the indictment valid. We adopt this rule and to the extent that *State ex rel. Reed v. Boles*, 148 W.Va. 770, 137 S.E.2d 246 (1964), and related cases espouse a per se rule that the omission of the word "felonious" renders a felony indictment invalid, they are overruled.

HOMICIDE

Instructions

Accidental killing

State v. White, 301 S.E.2d 615 (1983) (Per Curiam)

See DEFENSES Accidental killing, (p. 86) for discussion of topic.

Burden shifting

State v. Kopa, 311 S.E.2d 412 (1983) (McHugh, J.)

See DEFENSES Alibi, (p. 87) for discussion of topic.

State v. Evans, 310 S.E.2d 877 (1983) (McHugh, J.)

See INSTRUCTIONS Burden shifting, (p. 295) for discussion of topic.

Diminished capacity

State v. Simmons, 309 S.E.2d 89 (1983) (Miller, J.)

See INSTRUCTIONS Diminished capacity, (p. 302) for discussion of topic.

First degree

State v. Louk, 301 S.E.2d 596 (1983) (Harshbarger, J.)

See HOMICIDE Malice, (p. 233) for discussion of topic.

State v. Clayton, 317 S.E.2d 499 (1984) (Harshbarger, J.)

See HOMICIDE Instructions, Retrial, (p. 231) for discussion of topic.

Instructions (continued)

Intent

State v. Ashcraft, 309 S.E.2d 600 (1983) (McGraw, J.)

The appellant contended the giving of the following instruction was error:

> You are further instructed that if two or more persons share a common intent and purpose to commit a homicide and each performs some act in the commission of said homicide, one doing one thing and the other something else, and said offense is committed, then each of such persons may be found guilty of said offense as charged.

The appellant argued that this instruction forced the jury to conclude that the appellant shared a co-defendant's intent to kill the victim when the jury could have just as easily have concluded that the appellant did not intend to kill the victim, but wounded and disarmed him with the intent to defend himself.

The Supreme Court found it appreciated the appellant's concern that the instruction may have been confusing and misleading to the jury. The Court found that while the instruction is, generally speaking, a correct statement of law, it failed to relate the law set out in the instruction to the evidence.

The Supreme Court found the possible confusion resulting from this instruction could have been cured by the giving of a defense instruction which was refused, but not assigned as error on appeal. This case was reversed on other grounds. The Supreme Court cautioned the trial court that should the same circumstance occur upon retrial, an objection to the challenged instruction should be sustained.

Instructions (continued)

Malice

State v. Schaefer, 295 S.E.2d 814 (1982) (Per Curiam)

"In a homicide case a jury verdict will not be reversed for the failure to give a proper instruction concerning malice which would apply to first and second degree murder under an indictment for first degree murder when the verdict returned is for voluntary manslaughter to which the refused instruction would not have applied. . . . " Syl., *State v. Putnam*, 157 W.Va. 899, 205 S.E.2d 815 (1974).

State v. Louk, 301 S.E.2d 596 (1983) (Harshbarger, J.)

See HOMICIDE Malice, (p. 233) for discussion of topic.

See INSTRUCTIONS Burden shifting, (p. 295) for discussion of topic.

State v. Clayton, 317 S.E.2d 499 (1984) (Harshbarger, J.)

See HOMICIDE Instructions, Retrial, (p. 231) for discussion of topic.

Lesser included offense

State v. Manns, 329 S.E.2d 865 (1985) (Miller, J.)

See HOMICIDE Felony murder, Lesser included offenses, (p. 224) for discussion of topic.

Manslaughter

State v. Ashcraft, 309 S.E.2d 600 (1983) (McGraw, C.J.)

See HOMICIDE Manslaughter, (p. 235) for discussion of topic.

Instructions (continued)

Mercy

State v. Kopa, 311 S.E.2d 412 (1983) (McHugh, J.)

Appellant was convicted of first degree murder. He alleged on appeal that the trial court erred when it instructed the jury that it could return the verdicts: first degree, first degree with a recommendation of mercy and not guilty. The appellant contended the inclusion of first degree with mercy in the face of his objection to such an instruction gave the jury a compromise verdict in violation of Code 62-3-15 (1965). During the discussion of the proposed instruction the appellant advocated a bifurcated proceeding so that the jury could consider a recommendation of mercy only after it had come to a determination of guilt. The Supreme Court found this to be without merit under the principles set forth in *State ex rel. Leach v. Hamilton*, 280 S.E.2d 62 (W.Va. 1980) where the Court specifically approved the "unitary trial procedure" of Code 62-3-15 (1965) to determine a defendant's guilt and the applicable punishment for first degree murder.

It is the mandatory duty of the trial court to instruct the jury that it may add a recommendation of mercy to a verdict of murder of the first degree and such duty shall be fulfilled by the trial court over the objection of the defendant unless it affirmatively appears from the record that the defendant understands the consequences of his action.

The Court found the trial court did not err when it included first degree with mercy among the possible verdicts.

Not supported by the evidence

State v. Schaefer, 295 S.E.2d 814 (1982) (Per Curiam)

Defendant contended that government instructions relating to murder should not have been given because there was no evidence to support them. The Supreme Court found the State's instructions were accurate statements of the law and, even if the evidence did not warrant instructions on first and second degree murder, any error in giving them was not prejudicial and must be considered harmless.

Instructions (continued)

Not supported by the evidence (continued)

State v. Schaefer, (continued)

"The general rule is that, where a crime is divided into degrees, if the court commits error in instructing the jury as to the higher degree of such a crime, and they return a verdict of guilty of a lower degree as to which they were properly instructed, the defendant cannot complain." Syl. pt. 4, *State v. McMillion*, 104 W.Va. 1, 138 S.E. 732 (1927).

State v. Mays, 307 S.E.2d 655 (1983) (Neely, J.)

Appellant alleged that a jury instruction that a verdict of murder in the first or second degree could be returned was improper. The Supreme court found there was sufficient evidence to support the instruction and the trial court did not err.

State v. Gum, 309 S.E.2d 32 (1983) (McGraw, C.J.)

Appellant was convicted of first degree murder. He alleged the trial court erred in refusing the defendant's instruction that the possible verdicts were murder in the first degree, murder in the second degree, voluntary manslaughter, involuntary manslaughter, and not guilty.

A State's instruction which was given listed the possible verdicts as murder in the first degree, murder in the second degree and not guilty.

The Supreme Court found there was virtually no evidence presented to support voluntary and involuntary manslaughter convictions, and the trial court was therefor justified in refusing to instruct on voluntary and involuntary manslaughter as possible verdicts.

See INSTRUCTIONS Not supported by the evidence, (p. 307) for discussion of topic.

Instructions (continued)

Provocation

State v. Louk, 301 S.E.2d 596 (1983) (Harshbarger, J.)

See HOMICIDE Malice, (p. 233) for discussion of topic.

Retrial

State v. Clayton, 317 S.E.2d 499 (1984) (Harshbarger, J.)

The defendant was convicted of voluntary manslaughter. In *State v. Clayton*, 277 S.E.2d 619 (W.Va. 1981), the case was remanded for a new trial due to insufficient evidence to support a verdict of first or second degree murder. The Supreme Court found there should not have been instructions on those degrees of murder in the first case, and that the trial court committed the same error in the second trial.

At the retrial the trial judge included in his charge to the jury an instruction that permitted them to find a verdict of second degree murder, and an instruction about inferring malice from the unjustified use of a deadly weapon. The prosecutor asked the jury in closing argument to return a verdict of second degree murder.

The Supreme Court found in *State v. Clayton I* that the jury should not have been instructed on either first or second degree murder since there was no proof of malice. The Court found that finding bound the trial court to give no instruction greater than voluntary manslaughter. The Court found this circumstance to be distinguishable from *State v. Cobb*, 272 S.E.2d 267 (W.Va. 1980) since in *Cobb,* the evidence would have supported instructions on higher degrees of homicide. In *Cobb*, the Court found that if the conviction was reversed, on retrial instructions for every degree of homicide which the evidence supports should be submitted to the jury. Here, the Court found in *Clayton I* as a matter of law the evidence did not support a finding of malice and first or second degree murder instructions were reversible error.

State v. Clayton, (continued)

The Supreme Court noted that in *State v. Brant*, 252 S.E.2d 901 (W.Va. 1979) they found the evidence would not support a finding of malice and in footnote 2 they wrote that on retrial any attempt by the State to prove malice to justify a first or second degree murder would be unconstitutional double jeopardy.

The Supreme Court found that because the evidence did not support a finding of malice, a murder instruction was unwarranted and the prosecutor should not have discussed malice and told the jury the State was asking for a second degree murder verdict. The Court found *State v. Schaefer*, 295 S.E.2d 814 (W.Va. 1982), where they stated that the giving of an instruction on a higher degree of a crime, even if unsupported by the evidence, is not reversible error if the jury returns a lower verdict, is distinguishable. In *Schaefer* the instructions were not given at a retrial after the Supreme Court had determined that giving any murder instruction required reversal. The Court also found there was no potential double jeopardy problems in *Schaefers* instruction.

The Supreme Court concluded the defendant's conviction must be reversed because the trial court and the prosecutor violated his double jeopardy rights by presenting malice to the jury.

Syl. pt. 1 - A judgement by this Court that as a matter of law there was insufficient evidence at trial to submit a possible murder verdict to a jury is equivalent to a judgement of acquittal on murder charges.

Syl. pt. 2 - Our State and federal double jeopardy clauses prohibit retrial of a defendant on any charge for which he has received a judgement of acquittal or a court's determination that there was insufficient evidence to prove the charge at his first trial.

HOMICIDE

Instructions (continued)

Second degree

State v. White, 301 S.E.2d 615 (1983) (Per Curiam)

Appellant was convicted of second degree murder. She alleged that a State's instruction, given to the court over objection, incorrectly stated that a killing done in the heat of passion may be murder in the second degree.

The Supreme Court found the State's instruction in question was somewhat inartfully worded, but correctly set forth the elements of voluntary manslaughter and murder in the second degree.

State v. Clayton, 317 S.E.2d 499 (1984) (Harshbarger, J.)

See HOMICIDE Instructions, Retrial, (p. 231) for discussion of topic.

Malice

State v. Louk, 301 S.E.2d 596 (1983) (Harshbarger, J.)

Defendant alleged the trial court erred by giving State's instructions that informed the jury that murder and malicious wounding were possible verdicts. Citing *State v. Kirtley*, 252 S.E.2d 374 (W.Va. 1978) she contended where provocation is shown to exist as a matter of law, a murder instruction or conviction is not warranted. Her evidence was that she was provoked into shooting the victims and she concluded the murder instructions were wrong. The Supreme Court found the defendant misread *Kirtley*, and that when the facts are disputed about whether there was a legally recognized reason for an assaultive reaction, a jury must resolve that question and a court may instruct on a possible murder verdict.

State v. Evans, 310 S.E.2d 877 (1983) (McHugh, J.)

Appellant was convicted of second degree murder. On appeal he contended there was insufficient evidence to prove malice beyond a reasonable doubt.

Malice (continued)

State v. Evans, (continued)

Syl. pt. 1 - "Whether malice exists in a particular case is usually a question for the jury, and although in perfectly clear cases, the courts have held that the evidence was not sufficient to show malice even where the jury had found to the contrary, yet malice is a subjective condition of mind, discoverable only by words and conduct, and the significance of the words and conduct of an accused person, whenever there can be doubt about such significance, addresses itself peculiarly to the consideration of the jury." Syl. pt. 4, *State v. Hamrick*, 112 W.Va. 157, 163 S.E. 868 (1932)

The Supreme Court found the customary manner of proving malice in a murder case is the presentation of evidence of circumstances surrounding the killing. *State v. Starkey*, 244 S.E.2d at 223, and that such circumstances may include *inter alia*, the intentional use of a deadly weapon, *State v. Toler*, 41 S.E.2d 850, 852-53 (W.Va. 1946), words and evidence of ill will or a source of antagonism between the defendant and the decedent, *State v. Brant*, 252 S.E.2d 901, 903 (W.Va. 1979).

The Supreme Court concluded there was sufficient evidence from which the jury could find malice.

HOMICIDE

Manslaughter

State v. Ashcraft, 309 S.E.2d 600 (1983) (McGraw, C.J.)

The appellant contended it was error for the court to refuse to instruct the jury to submit a verdict form on the lesser included offense of involuntary manslaughter.

"The offense of involuntary manslaughter is committed when a person, while engaged in an unlawful act, unintentionally causes the death of another, or where a person engaged in a lawful act, unlawfully causes the death of another." *State v. Baker*, 128 W.Va. 744, 38 S.E.2d 346 (1946).

The appellant contended that from the evidence, the jury could have believed that he accidentally or negligently shot the victim while brandishing a weapon in self-defense.

The Supreme Court found no merit in this contention since there was no evidence to support an involuntary manslaughter instruction. Given the lack of evidence supporting the instruction, the Court found it was not error for the trial court to refuse it.

"Refusal of an instruction, on a trial for murder, given the findings in the power of the jury, including one of involuntary manslaughter, is not error, when no evidence in the case tends to show that degree of homicide. Such instruction should not be given." *State v. Woodrow*, 58 W.Va. 527, 52 S.E.2d 545 (1905).

State v. Phelps, 310 S.E.2d 863 (1983) (Per Curiam)

See HOMICIDE Sufficiency of evidence, (p. 237) for discussion of topic.

Retrial

State v. Clayton, 317 S.E.2d 499 (1984) (Harshbarger, J.)

See HOMICIDE Instructions, Retrial, (p. 231) for discussion of topic.

HOMICIDE

Second degree murder

Transferred intent

State v. Hall, 328 S.E.2d 206 (1985) (Miller, J.)

See HOMICIDE Transferred intent, (p. 238) for discussion of topic.

Sufficiency of evidence

State v. Hall, 304 S.E.2d 43 (1983) (Neely, J.)

Where eight alibi witnesses testified that appellant was in Florida during the time the murder took place, but State's witnesses, including an accomplice, testified he was not, the evidence was sufficient to convict.

State v. Meadows, 304 S.E.2d 831 (1983) (McHugh, J.)

Appellant in this case was found guilty of first degree murder and sentenced to life imprisonment without mercy. Appellant contended that the evidence was insufficient to sustain a guilty verdict.

Evidence presented at trial was circumstantial, yet it was sufficient to convince impartial minds of the guilt of the appellant beyond a reasonable doubt. Evidence showed that the victim was killed near the Dillon residence at some time between 7:00 p.m. and 8:00 p.m. on November 28, 1979. At that same time appellant had borrowed a friend's car and that car was seen near the victim's car when the gun shots were heard. Furthermore, the victim's car was seen parked near the appellant's residence the morning following her death; yet appellant, that same day, reported having found her car in Bluefield. Appellant's actions were inconsistent. He completed a search for the car after he had reported finding it; and he "found" it again a few days later. Evidence was sufficient to place the appellant at the scene of the murder at the same time it occurred. There was a motive for the killing, i.e., jealousy.

Though the evidence was circumstantial, as to time, place, motive, means and conduct, it pointed to the accused as the perpetrator of the crime; thus, his conviction was proper.

Sufficiency of evidence (continued)

State v. Gum, 309 S.E.2d 32 (1983) (McGraw, C.J.)

The appellant was convicted of first degree murder. On appeal he alleged the trial court erred in failing to direct a verdict in the appellant's favor at the conclusion of the State's evidence.

The Supreme Court found the evidence produced at trial, when viewed in the light most favorable to the prosecution, was sufficient.

State v. Simmons, 309 S.E.2d 89 (1983) (Miller, J.)

The appellant contended the trial court should have granted her motion for acquittal. The Supreme Court found there was sufficient evidence to support the jury's verdict of second-degree murder.

State v. Phelps, 310 S.E.2d 863 (1983) (Per Curiam)

The appellant was convicted of voluntary manslaughter. On appeal he alleged there was no evidence presented at trial to prove he was guilty of voluntary manslaughter and that the trial court erred in not directing a verdict of acquittal.

The Supreme Court found the evidence produced at trial, when viewed in the light most favorable to the prosecution was sufficient to convince the jury of the guilt of the appellant beyond a reasonable doubt.

State v. Evans, 310 S.E.2d 877 (1983) (McHugh, J.)

See HOMICIDE Malice, (p. 233) for discussion of topic.

HOMICIDE

Sufficiency of evidence (continued)

Felony-murder

State v. Williams, 305 S.E.2d 251 (1983) (McGraw, C.J.)

Appellant was convicted of murder, arson and robbery. On appeal he contended the evidence was insufficient to support his conviction. He asserted there was no direct evidence identifying him as the perpetrator of the crimes and that no one actually saw the crimes being committed. The appellant alleged the State's evidence of his guilt was wholly circumstantial and, therefore, insufficient to support a conviction.

The Supreme Court found where circumstantial evidence concurs as to time, place, motive, means and conduct, in pointing to the accused as the perpetrator of the crime, it is sufficient to support a conviction. The Court concluded the evidence produced at trial when viewed in the light most favorable to the prosecution fulfilled these requirements. The Court found that while the evidence upon which the verdict was based was largely circumstantial, it was substantial and clearly sufficient to justify the jury's verdict.

Transferred intent

State v. Hall, 328 S.E.2d 206 (1985) (Miller, J.)

Appellant was convicted of second degree murder and unlawful wounding. He contends these verdicts are inconsistent . A State's instruction advised the jury that if they believed the defendant, without lawful excuse or justification, attempted to intentionally, maliciously, and deliberately kill James Lowe, but actually shot and killed David Lowe, then the elements of intent, malice, and deliberation could be transferred to the person actually shot and that it is not a defense that the defendant shot the wrong person. Appellant argues that since the jury found he did not act with malice in shooting James Lowe, no malice could be transferred to support the second degree murder conviction for the killing of David Lowe. The appellant contends the jury must have ignored or misunderstood the instructions of the court concerning the elements of second degree murder.

HOMICIDE

Transferred intent (continued)

State v. Hall, (continued)

The Court found the flaw in the appellant's argument is that the prosecution did not rely exclusively on a transferred intent theory. The State had several instructions giving the traditional definition of the elements of both first and second degree murder, as well as lesser-included offense instructions. The

Court found when the evidence is viewed in the light most favorable to the prosecution, the jury could have believed the prosecutions theory that after the defendant had seriously wounded James Lowe with the first shot, he shot and killed David Lowe as he was running away from the defendant. The Court found this would support the second degree murder conviction and the verdicts are not necessarily inconsistent.

The Court found that even if they accepted the defendant's argument that under a transferred intent theory the second degree murder verdict would be inconsistent with the unlawful wounding verdict, this would not constitute reversible error. They noted that the U.S. Supreme Court in *U.S. v. Powell*, 105 S.C. 471 (1984) concluded that appellate review of a claim of inconsistent verdicts is not generally available.

Unborn child

State ex rel. Atkinson v. Wilson, 332 S.E.2d 807 (1984) (Miller, J.)

Relator was convicted of first degree murder for the killing of Teri Lynn Gooch, who was approximately thirty-seven weeks pregnant at the time of her death. In this action, relator seeks to prohibit trial for the murder of the unborn child.

The Court notes that the parties agree that at common law, the killing of a viable unborn child was not murder.

Syl. pt. 1 - The legislature has the primary right to define crimes and their punishments subject only to certain constitutional limitations.

Unborn child (continued)

State ex rel. Atkins v. Wilson, (continued)

The Court found there is a difference between a court's power to develop the common law in areas which it has traditionally functioned, such as tort law, and in those areas in which the legislature has primary power such as the creation of crimes and penalties.

The Court decided Legislature is the more appropriate body of government to create new crimes. The Court noted that although they have occasionally altered common law rules in the area of criminal law, the alterations have been of a procedural nature and did not create a new category of crime.

Syl. pt. 2 - Neither our murder statute, *W.Va. Code*, 61-2-1, nor its attendant common law principles authorize prosecution of an individual for the killing of a viable unborn child.

INCONSISTENT VERDICTS

In general

State v. Hall, 328 S.E.2d 206 (1985) (Miller, J.)

See HOMICIDE Transferred intent, (p. 238) for discussion of topic.

IDENTIFICATION

Instructions

State v. Gravely, 299 S.E.2d 375 (1982) (McHugh, J.)

The appellant contended that the trial court erred in refusing to give defendant's instruction which would have informed the jury of the proper standards to be applied in criminal trials concerning the identification issue. The defendant's instruction was comparable to the model instruction adopted by the U.S. Court of Appeals in *United States v. Telfaire*, 469 F.2d 552 (D.C. Cir. 1972).

The Supreme Court found that the instructions given were sufficient to properly alert the jury to the identification issue, and declined to mandate the use of the model instruction adopted in *Telfaire*. The Court noted that the identification testimony of the victim in this case, the principal witness for the State, was corroborated by the testimony of another and to a lesser extent by the testimony of the police officers.

Right to counsel

See RIGHT TO COUNSEL Pre-trial identification, (p. 448) for discussion of topic.

Suggestive identification

Admission into evidence

State v. Boykins, 320 S.E.2d 134 (1984) (Per Curiam)

A Dairy Queen was robbed at gunpoint by a male assailant. The police received a tip that the appellant was the perpetrator. Appellant was located and agreed to cooperate by permitting his photo to be taken for use in a photo array. He was also in two lineups. He was subsequently indicted, tried and convicted of aggravated robbery. The appellant contends he was deprived of due process by admission of unreliable eyewitness identification testimony that was the product of pre-trial identification procedures that were both unduly suggestive and unnecessary.

Suggestive identification (continued)

Admission into evidence (continued)

State v. Boykins, (continued)

The Supreme Court found the focus of concern is on the reliability of the testimony. If after examining the totality of circumstances the identification evidence has sufficient indicia of reliability, despite the presence of suggestive procedures tending to negate reliability, the evidence is admissible.

A photographic array was shown separately to two eyewitnesses. Both selected the appellant as the robber, but neither was positive. The Court found the photo array was not unduly suggestive.

The Court found the lineups, however, were conducted in a manner that was manifestly unfair and overly suggestive. The Court found the appellant was the only person in the lineup who wore a dark blue or black toboggan, the type of that the perpetrator allegedly wore. All but one of the persons in the lineup was taller than the appellant, and the appellant was the only person whose picture was in the photo array that was also in the lineup. The Court found the question presented here is whether the eyewitness' identification was reliable despite the suggestive procedures. The Court turned to the reliability factors identified in *Neil v. Biggers*, 409 U.S. 188 (1972) to analyze this case.

Reviewing the facts of the case to determine the eyewitnesses' opportunity to view, degree of attention, accuracy of description, level of certainty, and the time between the time of the crime and the confrontation, the Court could not find a very substantial likelihood of misidentification. The Court found in the absence of a very substantial likelihood of misidentification, eyewitness testimony is for the jury to weigh.

Here, the Court noted the defense offered three instructions fully advising the jury about the identification evidence and the defense argued the identification point fully to the jury.

The Court noted another factor in the totality of the circumstances bearing on the reliability of the identification is that the appellant's alibi defense was essentially destroyed by the prosecution.

Suggestive identification (continued)

Admission into evidence (continued)

State v. Boykins, (continued)

Although the Court found the appellant was not denied due process by the pre-trial identification procedures in this case, they urged law enforcement authorities to adopt procedures that show any resulting identification to be accurate and reliable to avoid a miscarriage of justice. The Court found that by following procedures to minimize suggestivity such as taking photographs of lineups, the police also can reduce potential due process challenges to lineup testimony.

Denial of right to counsel

State v. Gravely, 299 S.E.2d 375 (1982) (McHugh, J.)

Syl. pt. 3 - The admission at trial of the testimony of a witness that he identified an accused prior to trial at a police initiated line-up or police initiated one-on-one confrontation between the witness and the accused, which pretrial identification procedure was a violation of the accused's right to counsel under the Sixth Amendment to the Constitution of the United States and under art. III, § 14, of the Constitution of West Virginia, constitutes reversible error, unless the admission of such testimony at trial is shown to be harmless constitutional error.

The Supreme Court found in this case that the police initiated one-on-one confrontation was clearly conducted in violation of the defendant's right to counsel, and that confrontation was described by the victim to the jury at trial. Such testimony could not but have a significant impact upon the jury. The Supreme Court was of the opinion that the admission of that testimony, concerning the pretrial identification of the defendant, to be error and that remanding this case upon the harmless error question would in this case serve no useful purpose.

State v. Gravely, (continued)

The Supreme Court further noted that upon cross-examination by defense counsel, testimony was elicited that the victim independently identified the defendant prior to trial from photographic displays. The record indicated that those photographic displays were somewhat suggestive. However the Court was not inclined from a review of the record to hold that the admission of that testimony was so improper or the displays so suggestive as to constitutes reversible error.

State v. Audia, 301 S.E.2d 199 (1983) (McHugh, J.)

Appellant contended that the in-court identifications deprived him to due process of law and should not have been permitted in that they were tainted by an unduly suggestive line-up conducted when the appellant was without benefit of counsel. The Supreme Court found that it appeared from the record that adversary judicial criminal proceedings had been instituted against the appellant, so that the subsequent line-up identification constituted a violation of his right to counsel. The Court found that since none of the witnesses testified to his pretrial identification of the appellant at trial, the admission of the in-court identifications of appellant by two witnesses who had viewed the line-up was governed by the standards set forth in syl. pt. 3, *State v. Casdorph*, 230 S.E.2d 476 (W.Va. 1976). Considering all the factors in *Casdorph*, the Supreme Court concluded that the trial court did not err.

State v. Sheppard, 310 S.E.2d 173 (1983) (McGraw, C.J.)

Appellant was convicted of two counts of kidnaping and one count of armed robbery. A line-up was conducted at the jail two days after the offense. Appellant was taken before a magistrate who informed him of the charges. Although the appellant refused to sign the acknowledgment of rights form, a check mark appeared in the box next to the phrase "I want counsel appointed for me." An attorney was appointed to represent the appellant.

State v. Sheppard, (continued)

The line-up consisted of eight men, in addition to the appellant, who were selected from the jail population for their physical resemblance to the appellant. Three witnesses identified the appellant as the perpetrator. Counsel for the appellant was not notified of or present at the line-up.

An *in camera* hearing was held at the conclusion two of the eyewitnesses were permitted to testify as to their out-of-court identification and they also identified the appellant from a photograph of the line-up which was admitted at trial, but not made part of the record. The two witnesses made an in-court identification of the appellant.

The appellant contended the admission of the testimony relating to the out-of-court identification of the appellant by the two witnesses was reversible error in that the line-up was conducted in the absence of the appellant's court-appointed attorney.

Syl. pt. 1 - "An adversary judicial criminal proceeding is instituted against a defendant where the defendant after his arrest is taken before a magistrate pursuant to *W.Va. Code*, 62-1-5- [1965], and is, *inter alia*, informed pursuant to *W.Va. Code* 62-1-6 [1965], of the complaint against him and of his right to counsel. Furthermore, where the defendant at that magistrate proceeding expresses identification of the defendant at a police initiated line-up or one-on-one police initiated confrontation between the defendant and a witness or crime victim, without notice to and in the absence of defense counsel, constitutes a violation of the defendant's right to counsel under the Sixth Amendment to the constitution of the United States and under art. III, § 14, of the constitution of West Virginia, so as to preclude any trial testimony in regard to the identification procedure. Syllabus Point 1, *State v. Gravely*, 299 S.E.2d 375 (W.Va. 1982).

The Supreme Court found that under *Gravely*, it is clear that once the appellant indicated his desire to have counsel appointed to represent him, it was improper for the police to initiate a line-up in the absence of counsel and consequently it was error for the trial court to permit the two witnesses to testify at trial about their out-of-court identification of the appellant.

State v. Sheppard, (continued)

In footnote 3, the Court noted that there was some question raised in the *in camera* hearing as to whether the line-up was initiated by the police. The trial court apparently concluded the appellant had requested the line-up. The Supreme Court noted if the line-up was conducted at the insistence of the appellant, this case would present issues not addressed by *Gravely*, but that in view of their ultimate resolution of the issue of whether the admission constituted harmless error, they found they did not need to address those issues of determine the correctness of the trial court's conclusion.

In this case, the Supreme Court found the erroneous admission of the out-of-court identification was harmless. They found that at trial, two eyewitnesses who did not view the line-up independently identified the appellant. One was the first kidnaping victim who positively identified the appellant as the man who forced him at gunpoint to assist in the robbery. He testified he had a good view of the appellant's face for approximately ten minutes. The other witness positively identified the appellant as the man who was with one of the kidnap victims and testified that h knew the appellant from a previous occasion.

The Supreme Court found the independent in-court identification, given with a high degree of certainty and uncontradicted, coupled with the fact that all of the stolen money, except for $20 was recovered from one kidnap victim's truck shortly after he escaped from the abductor, led them to believe it was apparent the erroneous admission of the improper out-of-court identification testimony was cumulative of other overwhelming evidence. The Court concluded the improper admission was harmless beyond a reasonable doubt and there was no reversible error in the admission of the in-court identification of the appellant by the witnesses.

State v. Boykins, 320 S.E.2d 134 (1984) (Per Curiam)

A Dairy Queen was robbed at gunpoint by a male assailant. The police received a tip that the appellant was the perpetrator. Appellant was located and agreed to cooperate by permitting his photo to be taken for use in a photo

State v. Boykins, (continued)

array. He was also in two line-ups. He was subsequently indicted, tried and convicted of aggravated robbery. Appellant contends his constitutional right to counsel was violated when he was forced to participate in a line-up after he had stated he wanted to talk to an attorney.

Syl. pt. 1 - "An accused is not constitutionally entitled to the assistance of counsel when placed in a line-up pursuant to and during a routine investigation of a crime and prior to initiation of adversary judicial criminal proceedings against him." Syllabus point 1, *State v. Moore*, 158 W.Va. 576, 212 S.E.2d 608 (1975).

The Supreme Court found no adversary judicial criminal proceedings triggering his right to counsel had been instituted against the appellant prior to the line-ups. The Court noted the appellant was not arrested after the line-up and was given a ride home by the police. The Court found the appellant is not entitled to exclude the evidence about his identification at pre-trial lineups based on a denial of right to counsel.

Jordan v. Holland, 324 S.E.2d 372 (1984) (Per Curiam)

Relator was convicted of armed robbery. Three Shoney's employees were robbed while making a deposit at the Teays Valley Bank at 4 a.m. The face of one of the robbers was hidden by a ski mask. The face of the other was visible. Relator's pickup truck was found at 5:25 a.m. about 75 yards from the bank. It was searched and a registration certificate bearing relator's name was found. Identification papers of Walter Holtan were also found. Later in the day, an arrest warrant was obtained, charging relator with the crime. At 7:30 a.m. two ski masks, a money bag, $2207 and a bank deposit ticket from Shoney's was discovered along the escape route, approximately one mile from the bank. The next day about 5 p.m., Walter Holtan was found standing next to the highway near the area where the money was discovered. He was arrested. About three hours later, police discovered the relator, partially covered by leaves, lying on the ground next to a fallen tree trunk about 15 feet from the road. He was arrested. Holtan and relator were taken to the

county jail. At about 7 p.m. on the following day, a line-up was held at the jail. One of the victims identified relator as the robber with the ski mask. A second victim identified Holtan, but not relator. No lawyer was present.

Relator contends the failure of the trial court to suppress evidence of the lineup identification violated his rights to due process and his right to counsel. Relator contends that at the time of the lineup, he had obtained legal representation.

The Court found that in *State v. Gravely*, 299 S.E.2d 375 (W.Va. 1982), in determining whether an accused has the right to counsel at a police-initiated pretrial identification proceeding, they held the right to counsel attaches when an adversary judicial criminal proceeding is instituted. The Court noted they identified this initial juncture as the point in time when "the defendant after his arrest is taken before a magistrate pursuant to *W.Va. Code* 62-1-6 (1965), of the complaint against him and of his right to counsel."

The Court found because of the deficiency in the record, they were unable to determine whether the relator was taken to a magistrate and advised of his right to counsel prior to his being placed in a lineup. The Court found they were unable to determine whether the relator had the right to the assistance of counsel at the lineup. The case was remanded for the taking of additional evidence on the question of relator's right to counsel at the lineup.

The Court found if it be determined on remand that the relator was taken before a magistrate, after arrest and prior to the lineup, and then requested appointment of counsel or indicated that he had counsel to represent him or, prior to the lineup, expressed a desire to be represented by counsel, then he would be entitled to a new trial.

In footnote 1, the court noted the admission of the testimony about the out-of-court identification cannot be deemed to have been harmless since the only testimony concerning an identification of the relator was the product of the alleged violation of relator's right to counsel.

Suggestive identification (continued)

Denial of right to counsel (continued)

Jordan v. Holland, (continued)

The Court found if a new trial is awarded, predicated on the denial of the relator's right to assistance of counsel at the lineup, all evidence pertaining to the lineup would be inadmissible.

Independent source

Jordan v. Holland, 324 S.E.2d 372 (1984) (Per Curiam)

See IDENTIFICATION Suggestive, Physical characteristics, (p. 252) for discussion of topic.

One-on-one confrontation

State v. Gravely, 299 S.E.2d 375 (1982) (McHugh, J.)

The Supreme court found that the robbery was committed by two black males. At the time the victim identified the defendant in the courthouse basement, the defendant was the only black male present. The identification occurred as the defendant was being escorted from the magistrate's office to the county jail. Thus, the identification resulted from a one-on-one view of the defendant by the victim. No lineup was ever conducted. The Supreme Court found that such one-on-one confrontation procedures are inherently more suggestive than lineup identification procedures. The Supreme Court concluded that the basement identification of the defendant was suggestive.

State v. Hall, 304 S.E.2d 43 (1983) (Neely, J.)

Prosecution's witness, while being held in jail on another charge, was shown a photograph of the appellant and identified him as the man he had seen in the murder victim's residence several days before the murder. Appellant argued that the in-court identification of the appellant by this prosecution witness was tainted by overly suggestive photo identification.

Suggestive identification (continued)

One-photo show-up

State v. Hall, (continued)

The United States Supreme Court standards is that photographic identifications are constitutionally tainted if the procedure used was "so impermissively suggestive as to give rise to a very substantial likelihood of irreparable misidentification."

Syl. pt. 7 - A one-photo show-up is not "so impermissively suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Simmons v. United States*, 390 U.S. 377, 384 (1968), in circumstances where there are convincing collateral indicia of reliability in the identification.

The identification in this case was of someone seen three days before the crime, not at the scene of the crime; thus, problems inherent in scene-of-the-crime identifications such as the furtive behavior of the criminal and the panicky state of a victim or eyewitness are less applicable here. Moreover, usually in a criminal identification, the victim and the eyewitness know what the crime was and are trying to identify the perpetrator, but here, the witness had to identify the crime itself. The witness' identification - "He's the guy" - was corroborated and confirmed by the witness' ability to supply, without prompting, where and with whom he had seen appellant.

Where a victim or eyewitness to a crime is asked to identify a suspect, there is usually no collateral indicia of reliability of the identification other than the procedure; but when the witness knows, without prompting, both where and with whom he saw the suspect, the procedure itself will not give rise to a substantial likelihood of misidentification. The witness' ability to supply *where* and *when* was collateral indicia of the reliability of the identification sufficient to convince the court that there was no substantial likelihood of irreparable misidentification.

Suggestive identification (continued)

Physical characteristics

Jordan v. Holland, 324 S.E.2d 372 (1984) (Per Curiam)

Appellant was convicted of armed robbery. He contends a lineup identification was overly suggestive and that he was thereby denied due process. The deputy sheriff who arranged the lineup testified that the four inmates selected to be in the lineup in addition to the two suspects were all approximately the same height and weight. A color photo of the lineup participants introduced at the suppression hearing showed that the two suspects were the only ones who were clean shaven. The Court noted that in light of the testimony the relator was identified as the robber whose face was covered with a ski mask, such characteristics as facial hair are insignificant for the purpose of determining suggestiveness, and that the photo did not verify relator's claim that the other lineup participants were of different physical stature from the relator.

The Court did not believe the record showed the lineup procedure was conducted in a suggestive manner. They emphasized the discussion of suggestiveness in this case was only intended as guidance to the circuit court, in the event that it be subsequently determined on remand that relator's right to counsel was not violated. (See IDENTIFICATION Suggestive, Denial of right to counsel, (p. 244)). The Court emphasized in the event of retrial, any potential in-court identification testimony must be scrupulously examined, *in camera*, because the lineup was the first occasion for the robbery victim to view the relator's face. Determination of whether there was an independent source must adhere to the standards set forth in *State v. Casdorph*, 230 S.E.2d 476 (W.Va. 1976).

Standard for determining

State v. Cox, 297 S.E.2d 825 (1982) (Per Curiam)

Applies standard set forth in syl. pt. 3, *State v. Casdorph*, 230 S.E.2d 476 (W.Va. 1976). (Found in Vol. I under this topic.)

Here, the Supreme Court found the totality of the circumstances indicated the witnesses in-court identification was reliable an its admission was proper.

Suggestive identification (continued)

Standard for determining (continued)

State v. Dye, 298 S.E.2d 898 (1982) (Per Curiam)

Applies standard set forth in syl. pt. 3, *State v. Casdorph*, 230 S.E.2d 476 (W.Va. 1976). (Found in Vol. I under this topic.)

In this case, the lineup consisted of the defendant and three other individuals who were brought to the defendant's jail cell and placed inside with him. No counsel was present, witnesses Waugh and Galford viewed the subjects and identified the defendant as the person they had seen. They subsequently identified him at trial.

The Supreme Court found that under these circumstances, they did not need to address the propriety of the lineup conducted. The lineup was not viewed by the victim of the crime who positively identified the defendant at trial, nor by a person who witnessed the crime and also identified the defendant at trial. Another witness, who placed the defendant at the scene of the crime and corroborated other evidence by the prosecution, did not view the lineup. There was no testimony at trial regarding the lineup itself. The Supreme Court found that under these circumstances, the admission of the in-court identifications of the witnesses who had viewed the allegedly flawed lineup was governed by the standards in *Casdorph*. The Court found that both of these witnesses had ample opportunity to observe the defendant independent of the lineup. Considering all the factors set forth in *Casdorph*, the Court could not say the trial court erred in admitting the identifications of the defendant by the two witnesses.

In addition to the lineup, the State used a photographic array to identify the defendant prior to trial. The defendant contended that the array was unduly suggestive. Applying the standard set forth in syl. pt. 4, *State v. Harless*, 285 S.E.2d 461 (W.Va. 1981), the Supreme Court found that the trial court was correct in ruling that they were not impermissibly suggestive.

State v. Gravely, 299 S.E.2d 375 (1982) (McHugh, J.)

Applies standard set forth in syl. pt. 3, *State v. Casdorph*, 230 S.E.2d 476 (W.Va. 1976). (Found in Vol, I under this topic.)

Suggestive identification (continued)

Standard for determining (continued)

State v. Audia, 301 S.E.2d 199 (1983) (McHugh, J.)

Appellant contended that the in-court identifications deprived him of due process of law and should not have been permitted in that they were tainted by an unduly suggestive photo array.

The Supreme Court examined the photos in the array, the testimony about the procedure used in presenting it and examined photos of the lineup participants and testimony about procedures used with it, and concluded that neither was suggestive. The police were successful in locating individuals who approximated the descriptions given by witnesses, and who were similar in appearance to the appellant. There was no testimony that the witnesses were coached in their choices, and the record indicated that each was certain of his identification of the appellant as one of the perpetrators. No testimony about the previous identifications was elicited at trial.

State v. Bennett, 304 S.E.2d 28 (Per Curiam)

During a five-hour period an undercover state trooper was twice shown a photographic array containing appellant's photo. The appellant alleged the trial court should have granted his motion to suppress the in-court identification based on this inherently suggestive out-of-court identification, and that the State did not show that the trooper had an independent reliable source to make the identification.

The Supreme Court found the photo array was not suggestive, and that the trooper's observation of the appellant on the day of the marijuana sale provided an independent, reliable basis for making the identification.

IDENTIFICATION

Suggestive identification (continued)

Suggestive photo array

State v. Watson, 318 S.E.2d 603 (1984) (Miller, J.)

The appellant claimed the pretrial photo array was impermissibly suggestive in that 1) three of the five photos showed men with facial hair while he was clean and shaven in his, and 2) only his photo was in black and white.

The Supreme Court examined the photos and found they were not impermissibly suggestive with regard to the physical characteristics.

The Supreme Court found the fact that the appellant's photo was the only black and white picture was unfavorable but not reversible error.

Syl. pt. 8 - A photographic array will not be deemed unduly suggestive merely because the defendant's photograph is of a different color than the others in the array. However, such an array will be closely scrutinized for other objectionable discrepancies, and such discrepancies, if found, will render the array unduly suggestive.

Tainted in-court identification

State v. Gravely, 299 S.E.2d 375 (1982) (McHugh, J.)

The Supreme Court found that the police initiated identification of the defendant by the victim as one of the perpetrators of the robbery violated the defendant's right to counsel, and, in addition, the identification was suggestive. The issue presented was whether this identification of the defendant tainted the victims in-court identification and thus violated the defendant's right to due process under the United States and West Virginia Constitutions. As a result of the *in camera* hearing conducted prior to trial, the trial court resolved the issue by submitting to the jury the question of the defendant's identity as one of the perpetrators of the robbery.

Suggestive identification (continued)

Tainted in-court identification (continued)

State v. Gravely, (continued)

The Supreme Court found that, considering the totality of the circumstances, the State in this case established at trial that the observation by the victim of the perpetrators during the robbery was sufficient to form the basis of the victim's in-court identification of the defendant, regardless of the improper basement identification of the defendant prior to trial.

The Supreme Court noted that the facts concerning the factors set forth in *State v. Casdorph*, 230 S.E.2d 476 (W.Va. 1976) were in conflict in this case. However, it was clear that the area of the robbery was well lighted and that the victim was near to and looked at the unmasked robber later identified by the victim as the defendant. The Supreme Court found no error, therefore, with respect to the victim's in-court identification of the defendant, and found that the defendant's right to due process was not violated.

ILLEGALLY HINDERING AN OFFICER

Unlawful fleeing to avoid arrest

State v. Jarvis, 310 S.E.2d 467 (1983) (Harshbarger, J.)

The appellant was convicted of illegally hindering or obstructing a police officer in the exercise of his official duty. On appeal he alleged the trial court should have granted a judgement of acquittal on this charge.

The Supreme Court found that the appellant's act of unlawful fleeing to avoid a lawful arrest illegally hindered a State trooper in the lawful exercise of his official duties. The Court noted that if his flight had not been illegal, there would not have been a violation of the statute (Code 61-5-17).

Syl. pt. 1 - Any person, upon being advised by a police officer that he is being arrested pursuant to a warrant, who flees in an automobile or otherwise and thereby avoids immediate arrest, is guilty of illegally hindering an officer of this State in the lawful exercise of his official duty, in violation of *W.Va. Code* 61-5-17.

IMMUNITY

Authority to offer

Myers v. Frazier, 319 S.E.2d 782 (1984) (Miller, J.)

See PLEA BARGAINING In general, (p. 398) for discussion of topic.

Refusal to testify

In re Yoho, 301 S.E.2d 581 (1983) (Harshbarger, J.)

See CONTEMPT Refusal to testify before grand jury, (p. 68) for discussion of topic.

After a grant of immunity, a defendant has no reason to invoke his Fifth Amendment privilege against self-incrimination; thus when defendant, under a grant of immunity, refused to testify before a grand jury, he was sentenced for contempt of court.

State v. King, 313 S.E.2d 440 (1984) (Per Curiam)

See NEW TRIAL-NEWLY DISCOVERED EVIDENCE In general, (p. 391) for discussion of topic.

IMPEACHMENT

One's own witness

State v. Kopa, 311 S.E.2d 412 (1983) (McHugh, J.)

See WITNESSES Impeachment, Prior inconsistent statements, (p. 614) for discussion of topic.

INDICTMENT

Discovery

State v. Sheppard, 310 S.E.2d 173 (1983) (McGraw, J.)

See DISCOVERY Indictment, (p. 116) for discussion of topic.

Dismissal

Improper evidence before grand jury

State v. Clements, 334 S.E.2d 600 (1985) (Brotherton, J.)

Appellant contends the indictments should be dismissed because several items of improper evidence were presented to the grand jury. This evidence included a videotape of the autopsies on the decayed bodies of the victims and a statement by the prosecutor that the defendant had a history of violence and a history of forcible rape. The Supreme Court found the grand jury was not designed to be the ultimate finder of facts. If anything improper is given in evidence before a grand jury, it can be corrected in the trial before a petit jury. The court found any evidentiary errors in the prosecution's case before the grand jury were not cause for reversal, where the errors were not repeated before the petit jury.

Felony murder

State v. Young, 311 S.E.2d 118 (1983) (Neely, J.)

See HOMICIDE Felony murder, Elements, (p. 222) for discussion of topic.

Homicide

State v. Hall, 304 S.E.2d 43 (1983) (Neely, J.)

See HOMICIDE Indictment, (p. 224) for discussion of topic.

INDICTMENT

Probable cause standard

State ex rel. Hamstead v. Dostert, 313 S.E.2d 409 (1984) (McGraw, J.)

See GRAND JURY Prosecutor's role, (p. 204) for discussion of topic.

Pre-indictment delay

State ex rel. Bess v. Hey, 301 S.E.2d 580 (1983) (Per Curiam)

See PRE-INDICTMENT DELAY In general, (p. 407) for discussion of topic.

Robbery by violence

State v. Beckett, 310 S.E.2d 883 (1983) (Miller, J.)

See ROBBERY Indictment, (p. 452) for discussion of topic.

Role of citizen

State ex rel. Hamstead v. Dostert, 313 S.E.2d 409 (1984) (McGraw, J.)

See GRAND JURY Prosecutor's role, (p. 204) for discussion of topic.

Role of court

State ex rel. Hamstead v. Dostert, 313 S.E.2d 409 (1984) (McGraw, J.)

See GRAND JURY Prosecutor's role, (p. 204) for discussion of topic.

Role of prosecutor

State ex rel. Hamstead v. Dostert, 313 S.E.2d 409 (1984) (McGraw, J.)

See GRAND JURY Prosecutor's role, (p. 204) for discussion of topic.

INDICTMENT

Sufficiency

State v. Fairchild, 298 S.E.2d 110 (1982) (McGraw, J.)

Syl. pt. 1 - An indictment for a statutory offense is sufficient if, in charging the offense, it substantially follows the language of the statute, fully informs the accused of the particular offense with which he is charged and enables the court to determine the statute on which the charge is based.

State v. Hall, 304 S.E.2d 43 (1983) (Neely, J.)

Applies standard set forth in syl. pt. 1, *State v. Fairchild*, 298 S.E.2d 110 (W.Va. 1982) cited above.

See HOMICIDE Indictment, (p. 224) for discussion of topic.

State v. Beckett, 310 S.E.2d 883 (1983) (Miller, J.)

See ROBBERY Indictment, (p. 452) for discussion of topic.

Uniforms securities act violations

State v. Fairchild, 298 S.E.2d 110 (1982) (McGraw, J.)

See UNIFORM SECURITIES ACT VIOLATIONS Indictment, (p. 571) for discussion of topic.

INDIGENTS

Expenses

State v. Less, 294 S.E.2d 62 (1981) (McHugh, J.)

W.Va. Code 51-11-18 provides for reimbursement for "necessary expenses". There is no duty on the part of the judge to appoint an investigation where the defense attorney, in his discretion, requests one.

Syl. pt. 6 - It is a matter within the sound discretion of the trial judge whether investigative services are necessary under *W.Va. Code*, 51-11-18, [sic] and the exercise of such discretion will not constitute reversible error unless the trial judge abuses such discretion.

Advance payment of expenses

State v. Audia, 301 S.E.2d 199 (1983) (McHugh, J.)

See INDIGENTS Expenses, Exceeding the statutory limit, (p. 263) for discussion of topic.

Exceeding the statutory limit

State v. Audia, 301 S.E.2d 199 (1983) (McHugh, J.)

The appellant filed a "motion to produce" an itemization by date, hour and individual, of all time expended by agents and employees of the State in the investigation of this case asserting that it was necessary to determine the likely cost of retaining an independent investigator to aid in the preparation of his defense.

Appellant also filed a "motion for advance expenses" seeking advance authorization to incur expenses for an investigator, in a sum which would permit an investigation comparable to that conducted by the State, or int the alternative, $5,000. Both motions were denied.

The Supreme Court noted that it was recognized in *State ex rel. Foster v. Luff*, 264 S.E.2d 477 (W.Va. 1980) that "where good cause has been shown for retaining the services of an expert, but the trial court has arbitrarily

INDIGENT

Expenses (continued)

Exceeding the statutory limit (continued)

State v. Audia, (continued)

refused, reversible error may result." The Court noted that although *Foster* dealt with additional expert witness fees, its analysis is applicable to fees for investigative services which are covered by the same statute.

The Supreme Court found that defense counsel had made no attempt to ascertain the possible cost of hiring an investigator prior to the hearing on the motions, but planned to consult one as soon as he learned how many hours the State had spent on its investigation. The Court found that in the absence of some estimates of contemplated costs, it would have been impossible for the trial court to determine if appellant's expense would have exceeded $500.

Applying the standard set forth in syl. pt. 6, *State v. Less*, 294 S.E.2d 62 (W.Va. 1982), cited above, the Supreme Court found that good cause for appellant's request was not shown, and the court's refusal to approve additional expenses was not an abuse of discretion.

Propriety of court-appointed counsel accepting additional fees

In re L.E.C., 301 S.E.2d 627 (1983) (Harshbarger, J.)

See ATTORNEYS Reprimands, (p. 43) for discussion of topic.

Right to counsel

Appointment of counsel

State v. Sheppard, 310 S.E.2d 173 (1983) (McGraw, J.)

The appellant repeatedly objected to the manner in which his attorneys were appointed to represent him. He assigned as error the failure of the judges involved in his trial and post-conviction proceedings to consult with him before appointing counsel and to make such appointment in open court in the appellant's presence with his consent.

INDIGENTS

Right to counsel (continued)

Appointment of counsel (continued)

State v. Sheppard, (continued)

The Supreme Court found an indigent defendant, while entitled to appointment of counsel, is not entitled to the appointment of a lawyer of his own choosing. The duty of the trial court is to ensure that the accused is effectively represented by a lawyer reasonably skilled and experienced in criminal law.

Dissatisfaction/rejection of appointed counsel

State v. Sheppard, 310 S.E.2d 173 (1983) (McGraw, J.)

The trial court refused to permit the appellant's court-appointed attorneys to withdraw from the case on the eve of trial. The motion alleged a complete breakdown of communications between the appellant and his counsel. The circuit court conducted a hearing on the matter at which the appellant explained that he did not trust his attorneys to represent him because they had refused to file motions on his behalf or to provide him with documents he had requested and because one of them was a friend of the assistant prosecutor. The circuit court found no merit in these allegations and concluded appellant refused to cooperate with court-appointed counsel.

The Supreme Court applied standards set forth in syl. pt. 2 and syl. pt. 4, in part, *Watson v. Black*, 239 S.E.2d 664 (W.Va. 1977).

The circuit court found the appellant's criticisms were unjustified. The appellant did not specify the motions counsel had failed to make and documents he had been refused related to a matter which had already been decided. The circuit court inquired into counsel's relationship with the assistant prosecutor and discovered that although the two were friends and occasionally shared living quarters, co-counsel was not involved in the prosecutor's law practice or in his campaign for the office of prosecutor.

The Supreme Court could not say, upon this record, that the trial court abused its discretion in refusing to allow the court appointed attorneys to withdraw.

State v. Sheppard, (continued)

They found the appellant's complaints about counsels performance were not sufficiently serious to warrant their removal from the case. The Court noted a disagreement over tactics or mere dissatisfaction with the services of court-appointed counsel does not, by itself, entitle the defendant to appointment of new counsel. *State v. Pepperling*, 177 Mont. 464, 582 P.2d 341 (1978), *State v. Hutchinson*, 303 N.C. 321, 279 S.E.2d 788 (1981).

Nor was the alleged conflict resulting from co-counsel's friendship with the prosecutor shown to have any effect on counsel's competence as an advocate or to present any likelihood of prejudice to the appellant's defense. See *State v. Thacker*, 301 N.C. 348, 271 S.E.2d 252 (1980).

The Supreme Court found also that, more importantly, they could not say the trial court abused its discretion in finding that the appellant deliberately refused to cooperate with his attorneys as a means of creating delay. The Court noted the breakdown in communication did not occur until the eve of the trial, over 16 months after one attorney was appointed and almost one year after co-counsel was appointed. The appellant had expressed dissatisfaction with his attorneys on one occasion nearly 8 months before. The Court noted the appellant was no stranger to the intricacies of criminal law and was well aware that his request could result in further delay. The Supreme Court concluded there was no error in the trial court's denial of the motion for substitution of counsel.

Syl. pt. 6 - Where on the eve of trial a defendant deliberately refuses to cooperate with his court-appointed counsel and seeks appointment of new counsel, solely as a means of delaying the proceedings, the defendant's objections to his court-appointed attorney cannot be said to be made in good faith and the request for substitution of counsel may be denied by the trial court.

After the trial court refused the motion for substitution of counsel, the court-appointed attorneys asked for a continuance so they might present the issue to the Supreme Court. The trial court refused the delay and both attorneys appeared for trial.

Right to counsel (continued)

Dissatisfaction/rejection of appointed counsel (continued)

State v. Sheppard, (continued)

The appellant contended it was error for the trial court to refuse the motion. The Supreme Court found in view of the holding that the denial of the motion for substitution of counsel did not constitute reversible error, there was no injury or prejudice to the rights of the appellant and any error in the trial court's refusal to grant a continuance must be viewed as harmless.

State v. Bogard, 312 S.E.2d 782 (1984) (Per Curiam)

On the morning of the trial, the appellant's counsel moved a withdraw claiming the appellant refused to cooperate. The motion was denied. Following the conviction, the appellant moved for a new trial and arrest of judgement based partially on the judge's refusal to relieve his attorney and the judge's failure to inquire into the reasons for the request. The trial court held a hearing on the motion at which time the appellant testified his reasons for believing his attorney should have been allowed to withdraw and also testified that he had not made his dissatisfaction known to the judge or any one else involved in the case. Defense counsel also testified at the hearing.

The appellant alleged that as soon as the trial judge learned of difficulties between the appellant and his attorney, he should have immediately held an *in camera* hearing.

The Supreme Court found no suggestion to the trial judge that there was such a conflict of interest, breakdown in communication, or irreconcilable conflict as would require him to stop the proceedings and hold a hearing; that appellant had made no representation to the court that he was dissatisfied with his attorney; and that the attorney merely expressed his dissatisfaction with the appellant's lack of cooperation. The Supreme Court found that they had made it clear in *Watson v. Black*, 239 S.E.2d 664, (W.Va. 1977) that a defendant will not be allowed to invite error by refusing to cooperate with his counsel.

Right to counsel (continued)

Dissatisfaction/rejection of appointed counsel (continued)

State v. Bogard, (continued)

The Supreme Court found that since the appellant made no suggestion to the court that he was dissatisfied with his counsel at the time counsel moved to withdraw from the appointment, they could not say that the trial court was clearly wrong in failing to hold an immediate hearing on the matter. The Supreme Court noted that unfortunately, the trial court held a hearing after trial which showed the alleged conflicts were merely differences of opinion regarding pre-trial strategy and tactics. The Supreme Court found the transcript supported the trial judge's decision not to relieve counsel on the day of trial, especially since the appellant had demanded a speedy trial.

Effective assistance

State ex rel. M.S.B. v. LeMaster, 313 S.E.2d 453 (1984) (Neely, J.)

See JUVENILE Right to counsel, Right to effective assistance, (p. 356) for discussion of topic.

INEFFECTIVE ASSISTANCE

Absence of defendant at pretrial deposition of prosecution witness

State v. Cabalceta, 324 S.E.2d 383 (1984) (Per Curiam)

See CRITICAL STAGE Pretrial deposition, (p. 84) for discussion of topic.

Burden and standard of proof

State v. Jacobs, 298 S.E.2d 836 (1982) (Per Curiam)

The burden is on the defendant to prove ineffective assistance by a preponderance of the evidence.

State v. Cecil, 311 S.E.2d 144 (1983) (McHugh, J.)

Applies standard set forth in syl. pt. 22, *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974), as noted in *Carrico v. Griffith*, 272 S.E.2d 235 (W.Va. 1980), found in main text under this topic.

Distance between client and attorney

State ex rel. M.S.B. v. LeMaster, 313 S.E.2d 453 (1984) (Neely, J.)

See JUVENILE Right to counsel, Right to effective assistance, (p. 356) for discussion of topic.

Failure to advise

State v. Cecil, 311 S.E.2d 144 (1983) (McHugh, J.)

See GUILTY PLEAS Ineffective assistance, (p. 208) for discussion of topic.

INEFFECTIVE ASSISTANCE

Failure to call witnesses

State v. Bias, 301 S.E.2d 776 (1983) (Harshbarger, J.)

Syl. pt. 5 - When fourteen physicians, psychiatrists, and psychologists were unanimous in their opinions that a defendant was mentally ill, and an overwhelming majority of the experts found him to be psychotic, and defense counsel introduced the testimony of only two psychologists and one physician and none of the voluminous medical records from the institutions in which the defendant had been treated; and ignored other evidence of defendant's psychotic condition at the time he committed an offense, counsel was ineffective.

State v. Cooper, 304 S.E.2d 851 (1983) (Harshbarger, J.)

See INEFFECTIVE ASSISTANCE Failure to prepare, (p. 274) for discussion of topic.

State v. Sheppard, 310 S.E.2d 173 (1983) (McGraw, C.J.)

See INEFFECTIVE ASSISTANCE Failure to make motions, (p. 271) for discussion of topic.

Failure to make motions

State v. Cooper, 304 S.E.2d 851 (1983) (Harshbarger, J.)

"To the extent that defense counsel failed to make certain motions on behalf of the defendant which would normally have been made by an attorney who was reasonably knowledgeable of criminal law, we conclude that the omissions were not prejudicial, would not have in nay way influence the outcome of the case, and must be regarded as harmless error." Syl. pt. 19, *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974). *State v. Key*, 275 S.E.2d 924, 927 (W.Va. 1981).

Failure to make motions (continued)

State v. Sheppard, 310 S.E.2d 173 (1983) (McGraw, J.)

The appellant contended his court-appointed attorneys were ineffective in that they failed to file motions on his behalf, to provide him with copies of documents and court records, and to secure witnesses necessary to his defense and to intervene on the appellant's behalf with regard to jail conditions. He contended his attorneys were acting at the direction of the prosecutor and were part of a conspiracy to convict him.

The Supreme court found the appellant had not demonstrated by a preponderance of the evidence that his court-appointed attorney were ineffective or that ineffective assistance resulted in his conviction.

State v. Cecil, 311 S.E.2d 144 (1983) (McHugh, J.)

See SEARCH AND SEIZURE Warrant requirement, Emergency doctrine exception, (p. 462) for discussion of topic.

State v. Tadder, 313 S.E.2d 667 (1984) (McHugh, C.J.)

See SEARCH AND SEIZURE Warrantless, Standing to raise issue, (p. 472) for discussion of topic.

Failure to object

State v. Mullins, 301 S.E.2d 173 (1982) (Per Curiam)

Defendant claimed her counsel was ineffective when he failed to object to the prosecutor's remarks during closing argument on her failure to tell her story prior to trial. The Supreme Court found this assertion to be without merit.

Defendant claimed that defense counsel failed to make various evidentiary objections and failed to vouch the record on the decedent's violent tendencies. Particularly, the defendant asserted that her attorney should have objected to the introduction of the pistol and shell casing found at the scene

INEFFECTIVE ASSISTANCE

Failure to object (continued)

State v. Mullins, (continued)

of the shooting. The Supreme Court found that a proper foundation was made for their introduction. The defendant also asserted that an objection should have been made to six photographs depicting the deceased's body. The Supreme Court found the photos were not gruesome.

The defendant also asserted that he attorney was ineffective when he failed to object to an improper instruction given on self-defense. The Supreme Court found that this case was tried several months after the decision in *State v. Kirtley*, 252 S.E.2d 374 (W.Va. 1978) was published.

The effect of the *Kirtley* decision was not to make a radical change in our substantive law of self-defense but to moderate our instructional law on the ultimate burden of proof. The Supreme Court therefore found that the failure of the defense counsel to object to the instruction did not constitute ineffective assistance of counsel such that the case should be reversed on that ground.

See ATTORNEYS Professional responsibility, (p. 41); CONTEMPT Due process, (p. 65); CONTEMPT Recusal of trial judge, (p. 68), for discussion of topic.

Failure to prepare

State v. Jacobs, 298 S.E.2d 836 (1982) (Per Curiam)

The Supreme court found that of the four witnesses whom the appellant-petitioner claimed his counsel failed to interview, three were interviewed by defense counsel in connection with the appellant's first trial. Counsel did not interview the fourth witness, but knew the substance of the witness' potential testimony from other sources. For various reasons, involving both trial strategy and the nature of the relationship between the individual witnesses and the appellant, counsel believed that further investigation regarding these witnesses was unnecessary.

Failure to prepare (continued)

State v. Jacobs, (continued)

The Supreme court could not conclude that no reasonably qualified defense attorney would have acted in the same manner as defense counsel in this case, and therefore found the claim to be without merit.

State v. Bias, 301 S.E.2d 776 (1983) (Harshbarger J.)

Fourteen professionals had examined defendant by court order and had determined that defendant was mentally ill. A majority of these professionals found defendant to be psychotic. Defense counsel, however, failed to subpoena medical records and failed to offer as evidence hospital records that had been subpoenaed.

He also failed to offer three court orders finding defendant incompetent and committing him to state hospitals. Further, he failed to call witnesses, former attorneys, and expert witnesses to testify. Counsel presented the defense of insanity as a "possible minor defense", but had so inadequately prepared this defense that he did not subpoena medical and psychological witnesses until the first day of the trial. Defendant was convicted of first degree murder with no recommendation for mercy. The Court, recognizing that it would be hard to imagine a clearer case for an insanity defense, found that any competent criminal attorney would have attempted to bring the psychiatric evidence to the court's and jury's attention. Defense counsel was ineffective. Reversal of conviction.

See INEFFECTIVE ASSISTANCE Failure to call witnesses, (p. 270) for discussion of topic.

Failure to prepare (continued)

State v. Cooper, 304 S.E.2d 851 (1983) (Harshbarger, J.)

Appellant complained that his counsel failed to file enough pretrial motions to test the sufficiency of the robbery charge and indictment; failed to conduct an adequate investigation; called no witnesses; did not object to the state's use of evidence of appellant's use of stolen credit cards; failed to thoroughly cross-examine witnesses; failed to have an expert examine appellant's mental abilities; did not move for reconsideration of appellant's sentence; and failed to advise appellant to testify in his own defense.

The Court found (1) no indication of a lack of investigation; (2) evidence that appellant possessed the fruits of the crime, the credit cards, is always admissible; (3) appellant told his attorney he had no witnesses; (4) in an *in camera* conference the Court emphasized that it was the appellant's decision whether or not to testify; (5) appellant showed no signs of mental deficiency warranting examination by an expert; (6) counsel's failure to move for reconsideration of sentence was taken care of on appeal; (7) defense counsel's failure to make motions was no prejudicial; (8) there were no prejudicial comments made by trial court in front of the jury; and (9) there were no reversible instructional errors; (10) counsel was not ineffective.

State v. Bogard. 312 S.E.2d 782 (1984) (Per Curiam)

On the morning of the trial, appellant's appointed counsel moved to withdraw claiming the appellant refused to cooperate. The motion was denied. Defense counsel then moved for a continuance, which was denied. The appellant contends he was prejudiced by having to proceed to trial with counsel who was ill prepared and not solicitous of his concerns, and was thus denied effective assistance of counsel. Specifically, he alleged he was given inadequate notice of his attorney's intention to withdraw; he chose not to testify because his attorney could not assure him that a prior conviction would not be brought out at trial; that his attorney should have demonstrated that the State failed to prove intent, and that counsel failed to object to testimony of certain State's witnesses.

Failure to prepare (continued)

State v. Bogard. (continued)

The Supreme Court found that despite his request to withdraw, defense counsel engaged in extensive investigation and preparation, and conducted the trial as competently as any reasonably qualified defense attorney; that the appellant made the decision not to testify on his own, and not as the result of erroneous advise concerning his prior conviction; and, that the jury was adequately instructed about the element of intent to commit robbery, and that the State and defense fully addressed the issue in closing. The Supreme Court found the other complaints involved strategy, tactics and arguable courses of action, and they could not conclude that no reasonably qualified defense attorney would have acted in the same manner as defense counsel did in this case. The Supreme Court therefore found the appellant's claim to be without merit.

State v. Blevins, 328 S.E.2d 510 (1985) (Neely, J.)

Appellant was convicted of the felony sale and transfer of prazepam. He claims ineffective assistance of counsel on appeal.

The Court found appellant was denied effective assistance of counsel and is entitled to a new trial. The crux of the appellant's argument concerns the manner in which trial counsel prepared for and presented his clients insanity plea. The Court found the trial transcript indicated that counsel was entirely unfamiliar with the insanity defense and accordingly, failed adequately to prepare such a defense. The court found that although counsel served notice of a defense "based upon mental condition" weeks before trial, he neglected to secure copies of the appellant's medical records until a few days before trial and failed to introduce any of these records into evidence or exhibit much knowledge of their contents. A psychiatrists solicited by the defense attorney did testify at trial, but the Court found counsel appeared incapable of tying the doctor's testimony into a demonstration of his client's insanity. The Court found counsel was unaware, at the trial's commencement, of when the appellant had been arrested and was not able to recite the offense for which the appellant was brought to trial. The Court found counsel requested that a tape recording be played to the jury, although counsel had never listened to the tape before and despite warnings by the judge and the prosecu

State v. Blevins, (continued)

tor that the tape recording would "kill" the appellant. The Court found counsel's rambling and almost incomprehensible *voir dire*, opening statements and closing argument were other indications of his unpreparedness. Counsel declined to submit any written instructions to the trial court and after appellant was convicted, counsel acquiesced in the trial court's entering a sentencing order sentencing appellant to one to five years despite the maximum sentence of one to three years.

State v. Cabalceta, 324 S.E.2d 383 (1984) (Per Curiam)

Appellant contends consultations between counselor and herself were too infrequent and too brief to ensure adequate preparation for trial. The Court found no merit to this contention. The Court found there was adequate time and counsel was well prepared for trial.

Failure to vigorously represent

State v. Cecil, 311 S.E.2d 144 (1983) (McHugh, J.)

The appellant plead guilty to murder in the first degree and sexual abuse in the first degree. On appeal, he contended his counsel at trial was ineffective in not more aggressively seeking the exclusion from evidence of the appellant's written confessions.

Prior to trial, an *in camera* hearing was conducted by the trial court to determine the voluntariness of the appellant's first confession (the appellant sought admission of the second confession and the State sought admission of the third confession as a result of the admission of the first confession.) The trial court found the State had met its burden of proof in establishing that the appellant's first confession was voluntarily made.

The Supreme Court found no error with respect to the admission of the first confession, nor did the record reveal error with respect to the admission of the other two confessions.

The Court found no ineffective assistance of counsel concerning the appellant's confessions.

INEFFECTIVE ASSISTANCE

Guilty plea

Tucker v. Holland, 327 S.E.2d 388 (1985) (McGraw, J.)

Petitioner was indicted for first degree arson. Petitioner allegedly destroyed his rented mobile home in connection with a marital dispute. Petitioner retained counsel to represent him on the criminal charge and in collateral bankruptcy and divorce proceedings. Petitioner's offer of restitution was rejected. Minutes before the plea hearing, the prosecution agreed to a plea to third degree arson. Petitioner's attorney advised him not to plead guilty, but to offer a plea of *nolo contendere* was never discussed with the prosecutor and was not discussed with petitioner until moments before the trial. When the judge asked petitioner what he was pleading guilty to, petitioner responded "third-degree arson." Petitioner's attorney stated "[n]o, he's not, Your Honor. He's pleading nolo contendere to this charge." And " . . . You've reduced this charge already to third-degree and I'm not taking no nolo to that." Defense counsel then withdrew the plea and asked that the case be set for trial. Petitioner testified he was extremely upset following the plea hearing and he asked his attorney to go in and talk with the judge to see if the judge would allow him to plead guilty to third degree arson. The attorney replied the judge was upset and he was not going to bother him. Petitioner was subsequently tried and convicted of first degree arson.

The Court found the petitioner was mislead by counsel into believing the prosecution had consented to his pleading nolo to a lesser charge when the prosecution had only agreed to permit him to plead guilty. The court found this deprived petitioner of his right to make an informed choice concerning the actual offer communicated by the prosecutor. The Court found the attorney counseled petitioner to tender a plea without notifying him of the risks involved and that counsel's subsequent actions also denied petitioner of effective assistance.

The Court recognized that the accused may choose to balance his liberty interests in a particular manner. The Court refused to recognize, however, that such balancing may be performed by is attorney without his client's consent or knowledge. The Court found counsel's actions in this proceeding ventured beyond the bound of strategy, tactics or arguable courses of conduct, and beyond the normal customary degree of skill possessed by attorneys who are reasonably knowledgeable of criminal law. The Court found the advise given to the petitioner with regard to his plea was not so much manifestly

INEFFECTIVE ASSISTANCE

Guilty plea (continued)

Tucker v. Holland, (continued)

erroneous as it was manifestly false and misleading. The Court concluded petitioner was denied his constitutional right to effective assistance of counsel. The Court awarded the writ discharging the petitioner with directions to the trial court to permit tender, for consideration by the court, of a plea of guilty of third degree arson.

State v. Finney, 328 S.E.2d 203 (1985) (Per Curiam)

Appellant was convicted of unlawful wounding. He contends his guilty plea was not voluntarily and intelligently entered.

The Court applies standards set forth in syl. pt. 3, *State v. Sims*, 162 W.Va. 212, 248 S.E.2d 834 (1978) and syl. Pts. 2 and 3, *State ex rel. Burton v. Whyte*, 163 W.Va. 276, 256 S.E.2d 424 (1979).

The appellant became dissatisfied with his first court-appointed attorney and a new attorney was appointed to represent him.

The appellant's primary argument is not that the defense counsel made gross legal errors in advising him to plead guilty, but rather that defense counsel was inebriated during the suppression hearing. At the conclusion of the suppression hearing, the trial court found the appellant knowingly and intelligently waived his *Miranda* rights and gave two voluntary statements that were admissible in evidence. The appellant contends on appeal the primary factor influencing him to plead guilty was the trial court's ruling that the defendant's statements could be used against him at trial. Because of that, the appellant contends trial counsel's inebriation during the suppression hearing was manifestly prejudicial.

The Court noted there was some hearsay evidence that defense counsel was drinking alcoholic beverages in the jury's deliberation room during recesses. The trial judge filed an affidavit to the effect that he could not conclude that even if defense counsel had been drinking alcoholic beverages that his ability or skills were perceptively diminished or impaired.

INEFFECTIVE ASSISTANCE

Guilty plea (continued)

State v. Finney, (continued)

The Court found appellant's argument that his incriminating statements induced his plea totally ignores the critical fact that the defendant, after having had the benefit of advice from his first appointed attorney, waived his self-incrimination rights and testified before the grand jury in an effort to persuade them not to indict him. This was well in advance of the suppression hearing. The Court found in that testimony, the defendant made essentially the same admissions he made to law enforcement officers. The Court found the trial court correctly ruled the defendant's grand jury testimony was not subject to suppression on any constitutional ground and to that extent was relevant and admissible in the State's case in chief. In view of this ruling, the court found it improbable the defendant was in fact induced to enter a plea by the trial court's later ruling that his incriminatory statements to the police were admissible in evidence.

The court concluded defense counsel did not give manifestly erroneous legal advise to the defendant and that appellant's guilty plea was not motivated by counsel error. The Court found the authorities cited to them concerning intoxication of counsel are clearly inapposite.

The Court concluded appellant's plea was voluntarily and intelligently made, upon the evidence of reasonably competent counsel, and with a full understanding of the direct consequences of the plea.

Inadequate time to prepare

State v. Angel, 319 S.E.2d 388 (1984) (Per Curiam)

The appellant contended the trial court erred in relieving lead counsel in the presence of the jury, and in denying a continuance after remaining counsel advised the court they were unprepared for trial. He contends the late appointment of counsel, without adequate opportunity to prepare a defense, denied him effective assistance.

INEFFECTIVE ASSISTANCE

Inadequate time to prepare (continued)

State v. Angel, (continued)

The Supreme Court found no merit in these contentions. They found the discussion concerning the continuance took place out of the hearing of the jury and did not prejudice the appellant. The Court found the appointed attorney presented an adequate and competent defense.

Syl. pt. 2 - "The factors relevant in asserting claims of inadequate time to prepare for trial are: the time available for preparation, the likelihood of prejudice from the denial, the accused's role in shortening the effective preparation time, the degree of complexity of the case, the availability of discovery from the prosecution, the adequacy of the defense provided at trial, the skill and experience of the attorney, any pre-appointment or pre-retention experience of the attorney with the accuse fro the alleged crime, any representation of the defendant by other attorneys that accrues [sic] to his benefit, whether the plea for more time to prepare for trial is made in good faith, the public interest in a speedy trial of the case, and the time the defendant had been in prison awaiting trial." Syl. pt. 4, *State v. Bush*, 163 W.Va. 168, 255 S.E.2d 539 (1979).

The Supreme Court found no abuse of discretion in the trial court's denial of a continuance and found no ineffective assistance due to the refusal of the court to grant a continuance.

Inexperienced counsel

State v. Manns, 329 S.E.2d 865 (1985) (Miller, J.)

Appellant contended counsel was ineffective because they were not experienced trial lawyers. The Court found no specific dereliction pointed out and that counsel easily met the competent counsel test set out in *Scott v. Mohn*, 268 S.E.2d 117 (W.Va. 1980) which relied on syl. pt. 19 of *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974).

INEFFECTIVE ASSISTANCE

Standard for determining

State v. Jacobs, 298 S.E.2d 836 (1982) (Per Curiam)

Applies standard set forth in syl. Pts. 19 and 21, *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974). See *Watson v. Black*, 239 S.E.2d 664 (W.Va. 1977). (Found in Vol. I under this topic.)

State v. Mullins, 301 S.E.2d 173 (1982) (Per Curiam)

Applies standard set forth in syl. pt. 19 *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974). See *Watson v. Black*, 239 S.E.2d (W.Va. 1977). (Found in Vol. I under this topic.)

State v. Bias, 301 S.E.2d 776 (1983) (Harshbarger, J.)

Applies standard set forth in syl. pt. 19 of *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974) as noted in syl. pt. 1, *Watson v. Black*, 239 S.E.2d 664 (W.Va. 1977). (Found in Vol. I under this topic.)

Applies standard set forth in syl. pt. 21 of *State v. Thomas*, *supra*, as noted in *State v. Watson*, 264 S.E.2d 628 (W.Va. 1980). (Found in Vol. I under this topic.)

State v. Cooper, 304 S.E.2d 851 (1983) (Harshbarger, J.)

Applies standard set forth in syl. pt. 21, *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974). See *State v. Watson*, 264 S.E.2d 628 (W.Va. 1980). (Found in Vol. I under this topic.)

INEFFECTIVE ASSISTANCE

Standard for determining (continued)

State v. Cecil, 311 S.E.2d 144 (1983) (McHugh, J.)

Applies standard set forth in syl. pt. 19, *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974) as noted in syl. pt. 1, *Watson v. Black*, 239 S.E.2d 664 (W.Va. 1977). (Found in Vol. I under this topic.)

Applies standard set forth in syl. pt. 21, *State v. Thomas*, *supra*, as noted in *State v. Watson*, 264 S.E.2d 628 (W.Va. 1980). (Found in Vol. I under this topic.)

Carter v. Taylor, 310 S.E.2d 213 (1983) (Per Curiam)

Applies standard set forth in syl. pt. 19, *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974). See *Watson v. Black*, 239 S.E.2d 664 (W.Va. 1977). (Found in Vol. I under this topic.)

State v. Bogard, 312 S.E.2d 782 (1984) (Per Curiam)

Applies standard set forth in syl. Pts. 19 and 21, *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974). See *Watson v. Black*, 239 S.E.2d 664 (W.Va. 1977) and *State v. Watson*, 264 S.E.2d 628 (W.Va. 1980). (Found in Vol. I under this topic.)

Strategic decisions

State v. Cabalceta, 324 S.E.2d 383 (1984) (Per Curiam)

Appellant was convicted of manufacturing marijuana. She contends counsel was ineffective in that he agreed to stipulate marijuana was found on the farm where appellant was staying and failure to pursue a request for a jury view. The Court found the appellant was not prejudiced by these decisions and that strategic decisions, related to the jury view and stipulation, were not unreasonable, under the circumstances.

INFORMATION

Sufficiency of

State v. Wade, 327 S.E.2d 142 (1985) (McHugh, J.)

See FALSE SWEARING Sufficiency of information, (p. 202) for discussion of topic.

INSANITY

Adjudication of criminal responsibility before trial

State v. Audia, 301 S.E.2d 199 (1983) (McHugh, J.)

See COMPETENCY To stand trial, (p. 56) for discussion of topic.

State v. Bias, 301 S.E.2d 776 (1983) (Harshbarger, J.)

Applies standard set forth in syl. pt. 1, *State ex rel. Smith v. Scott*, 280 S.E.2d 811 (W.Va. 1981), and *State ex rel. Walton v. Casey*, 258 S.E.2d 114 (W.Va. 1979). (Found in Vol. I under this topic.)

Pretrial psychiatric examinations conducted over a period of years indicated that defendant was mentally ill. These records were sufficient to establish by a preponderance of the evidence that defendant lacked criminal responsibility.

Burden of proof

State v. Bias, 301 S.E.2d 776 (1983) (Harshbarger, J.)

Applies standards set forth in syl. pt. 2, *State v. Milam*, 260 S.E.2d 295 (W.Va. 1979). (Found in Vol. I under this topic.)

Confidentiality of medical records

State v. Simmons, 309 S.E.2d 89 (1983) (Miller, J.)

Upon the request of the State, the trial court ordered a psychiatric examination of the appellant. Dr. Smith did the examination. Dr. Hill was the appellant's treating psychiatrist. Both Dr. Hill and Dr. Smith practiced together at a clinic and as a result Dr. Smith had direct access to the appellant's medical records. The appellant contended Dr. Smith violated Code 27-3-1(a) when he obtained and read the appellant's medical records, which were on file in the chart room of the clinic, prior to his examination of the appellant.

INSANITY

Confidentiality of medical records (continued)

State v. Simmons, (continued)

Syl. pt 1 - *W.Va. Code*, 27-3-1(a), provides for confidentiality of communications and information obtained in the course of treatment and evaluation of persons who may have mental or emotional conditions or disorders, subject to the exceptions set out in *W.Va. Code*, 27-3-1(b).

Syl. pt. 2 - *W.Va. Code*, 27-3-1(b), specifies five situations where information otherwise deemed confidential may be disclosed. One of the exceptions is for proceedings under *W.Va. Code*, 27-6A-1, which relates to court-ordered mental examinations. This exception would permit disclosure of the results of such an examination by the examining professional.

The Supreme Court did not believe the exception is broad enough to permit the examiner to automatically obtain information that is in the custody or control of third parties relative to the person's mental or physical condition, and that this was the action taken by Dr. Smith in unilaterally obtaining some of Dr. Hill's records relating to the appellant's mental condition.

Syl. pt. 3 - Access to records held by a third party can be obtained under *W.Va. Code*, 27-3-1(b) (3), which permits a court to order production of such material if it finds "that said information is sufficiently relevant to a proceeding before the court to outweigh the importance of maintaining the confidentiality established by this section."

The Supreme Court noted the State did not request the court to make a finding under this exception to procure the information in the possession of Dr. Hill.

The Supreme Court concluded there may have been a violation of Code 27-3-1, but he violation did not constitute reversible error since the appellant introduced most of her records prior to the direct examination of Dr. Hill and these would have then been available to Dr. Smith who testified later as the State's rebuttal witness, and since the appellant did not argue that there was any particular prejudice arising from the use if the records.

Confidentiality of medical records (continued)

State v. Cheshire, 313 S.E.2d 61 (1984) (Per Curiam)

See COMPETENCY Confidentiality of medical records, (p. 54) for discussion of topic.

Directed verdict

State v. Williams, 301 S.E.2d 187 (1983) (Neely, J.)

See INSANITY Sufficiency of evidence, (p. 291) for discussion of topic.

Late request for psychiatric exam

State v. Simmons, 309 S.E.2d 89 (1983) (Miller, J.)

Upon the request of the State two days before the trial was scheduled, the trial court ordered a psychiatric examination of the appellant. The appellant contended the trial court erred in allowing the psychiatrist, Dr. Smith, to testify since the State's motion for the examination was untimely and prejudiced her trial preparation. Appellant argues the late request for psychiatric examination should be determined to be prejudicial under Syl. pt. 2, of *State v. Grimm*, 270 S.E.2d 173 (W.Va. 1980) which dealt with nondisclosure of evidence which the State was ordered to produce as a result of the defendant's pretrial discovery motions. (See DISCOVERY Nondisclosure, (found under Vol. I).

The Supreme Court noted that in this case the issue is a late request by the State which differs from nondisclosure or late disclosure of evidence previously ordered produced in that nondisclosure or late disclosure places a higher burden on the State to justify its failure to respond, and that a State's request for a psychiatric exam is usually triggered by the use of an insanity defense and the element of surprise for the defendant is considerably less.

The Supreme Court found that although there are differences, they believed that in this case the *Grimm* test for prejudice could be used by analogy in determining whether the appellant was surprised on a material issue which hampered the preparation and presentation of her case.

INSANITY

Late request for psychiatric exam (continued)

State v. Simmons, (continued)

The appellant contended the late examination was upsetting to her that defense counsel did not have an adequate opportunity to prepare for cross-examination or to secure another psychiatric witness to rebut Dr. Smith.

The Supreme Court found that the failure of defense counsel to move for a continuance may have a material bearing on whether the psychiatric examination could be asserted as reversible error, the Dr. Smith's testimony contributed very little to the State's case in that he expressed no opinion as to the defendant's insanity, the defendant was able to testify at trial and defense counsel did not point to specific evidentiary lapses supposedly brought about from the late examination, and that the defendant had raised the insanity defense and had expert witnesses on the issue.

The Supreme court found that although they did not approve of the State filing a Rule 12-2(c) motion so close to the trial date, there was no reversible error under these circumstances. They could envisage situations where such filing within two days of the trial might prejudice the defendant unless a continuance is requested and granted, and that the better practice would be for the State to have the defendant examined by its psychiatrist at an earlier time in the pretrial process after it had been notified under Rule 12-2 that an insanity defense will be relied upon.

Physician-patient privilege

State v. Simmons, 309 S.E.2d 89 (1983) (Miller, J.)

Upon the request of the State, the trial court ordered a psychiatric examination of the appellant. Dr. Smith did the examination. The appellant contended Dr. Smith violated appellant's physician-patient privilege with Dr. Hill, her treating psychiatrist, when he practiced together at a clinic and as a result Dr. Smith had directed access to the appellant's medical records.

INSANITY

Physician-patient privilege (continued)

State v. Simmons, (continued)

The Supreme Court found that these medical records had been introduced by the defendant prior to the direct examination of her psychiatric experts and were available to Dr. Smith when he testified in rebuttal. The Court thus found the appellant was not actually prejudiced and this finding coupled with the lack of any objection at trial foreclosed further consideration of the issue.

State v. Cheshire, 313 S.E.2d 61 (1984) (Per Curiam)

See COMPETENCY Confidentiality of medical records, (p. 54) for discussion of topic.

Instructions

State v. Jackson, 298 S.E.2d 866 (1982) (Harshbarger, J.)

The appellant proffered instructions that advised the jury about the further disposition of a defendant who is found not guilty by reason of insanity. The trial judge refused to permit a not guilty by reason of insanity verdict and refused instruction about further disposition.

The Supreme Court found this case was in litigation when *State v. Nuckolls* was decided and its rule applies here. The Court applies standard set forth in syl. pt. 2 of *Nuckolls*. (Found in Vol. I under this topic.)

State v. Bias, 301 S.E.2d 776 (1983) (Harshbarger, J.)

Applies standard set forth in syl. pt. 2, *State v. Nuckolls*, 273 S.E.2d 87 (W.Va. 1980). (Found in Vol. I under this topic.)

INSANITY

Instructions (continued)

Disposition

State v. Jackson, 298 S.E.2d 866 (1982) (Harshbarger, J.)

See INSANITY Instructions, (p. 288) for discussion of topic.

Standard for offering

State v. Scholfield, 331 S.E.2d 829 (1985) (Neely, C.J.)

Two days before trial, defense counsel notified the court they were considering an insanity plea. Nothing more was heard until after the appellant testified. Defense counsel asked for a recess to reconsider whether or not to present additional evidence on the issue of insanity. After the recess, they decided not to. They still requested insanity instructions. The court refused and stated it could not permit the insanity issue to go to the jury without further evidence. Appellant maintains the lower court erred by refusing to instruct the jury that she might have been insane at the time of the homicide, despite the dearth of evidence at trial and in the record that she could have been insane.

The Court found the only evidence presented to the jury at trial to suggest appellant was mentally unstable at the time of the offense was that she became angry during a pre-arrest interview after a detective advised her to consider her child and that she became hysterical when she saw her child in a detective's arms at the time of her arrest. Appellant testified that she was upset and "freaked out" when she shot the victim.

INSANITY

Standard for offering (continued)

State v. Schofield, (continued)

Syl. pt. 4 - Before an insanity instruction can be given in a criminal case the defendant must present some competent evidence on the subject; the defendant cannot ask the jury simply to consider, as an alternative to guilt or innocence, that the defendant could have been insane at the time of the alleged crime.

The Court found no lay testimony was introduced in this case and the trial court was correct that an insanity issue was not raised.

Right to counsel

State v. Jackson, 298 S.E.2d 866 (1982) (Harshbarger, J.)

See SELF-INCRIMINATION - STATEMENT BY DEFENDANT Statements to court-appointed psychiatrist, (p. 490) for discussion of topic.

Right to psychiatric evaluation

State v. Flint, 301 S.E.2d 765 (1983) (McHugh, J.)

Applies standard set forth in syl. pt. 4, *State v. Demastus*, 270 S.E.2d 649 (W.Va. 1980). (Found in Vol. I under COMPETENCY to stand trial.)

Appellant contended the trial judge erred in not granting the motion for a psychiatric evaluation with respect to the appellant's competency at the time of the shooting. The facts in this case indicated that the basis for the psychiatric evaluation was appellant's attorney's inability to "find anybody to say [the appellant] was anything but a normal boy in his growing up . . . ."

INSANITY

Right to psychiatric evaluation (continued)

State v. Flint, (continued)

From this investigation appellant's attorney theorized that something must have gone "amiss or awry" with the appellant at the time of the robbery and murder. The Supreme Court found the appellant did not make a sufficient initial showing that he was mentally incompetent at the time of the shooting, and in absence of such showing it was not an abuse of the trial judge's discretion to deny appellant's motion for a psychiatric evaluation.

Right to remain silent

State v. Jackson, 298 S.E.2d 866 (1982) (Harshbarger, J.)

See SELF-INCRIMINATION - STATEMENTS BY DEFENDANT Statements to court-appointed psychiatrist, (p. 490) for discussion of topic.

Sufficiency of evidence

State v. Williams, 301 S.E.2d 187 (1983) (Neely, J.)

The appellant asserted he was entitled to a direct verdict on the issue of his insanity, and that the court erred in refusing to grant the motion. The Supreme Court found that in this case the conflicting evidence adduced at trial foreclosed the possibility that the evidence was "conclusive" of insanity, even if, as the appellant alleged, his psychiatric experts were superior to the State's.

State v. Guthrie, 315 S.E.2d 397 (1984) (Harshbarger, J.)

The appellant offered evidence that he was insane. On appeal he alleged the State failed to rebut that evidence sufficiently to permit the matter to go to a jury.

INSANITY

Sufficiency of evidence (continued)

State v. Guthrie (continued)

The Supreme Court noted that appellant presented lay and expert testimony that he had organic brain damage, along history of drug and alcohol abuse, blackouts from substance abuse, and had drug and mental disorders. The State cross-examined his experts and called one psychiatrist who answered two questions about the appellant's mental state with yes and no answers and without explanations as to how he reached his conclusions.

The Supreme Court found the State's rebuttal was not well explained, but it was evidence, and that the question of appellant's sanity was properly presented to the jury. The Court concluded there was sufficient evidence for the jury to find he was sane.

Syl. pt. 3 - When conflicting evidence about a defendant's sanity is presented at trial, that issue should be resolved by a jury.

INSTRUCTIONS

In general

State v. White, 301 S.E.2d 615 (1983) (Per Curiam)

Syl. pt. 1 - "An instruction to the jury is proper if it is a correct statement of the law and if sufficient evidence has been offered at trial to support it." Syl. pt. 8, *State v. Hall*, 298 S.E.2d 246 (W.Va. 1982).

State v. Mays, 307 S.E.2d 655 (1983) (Neely, J.)

Applies standard set forth in syl. pt. 8, *State v. Hall*, 298 S.E.2d 246 (W.Va. 1982). See *State v. White*, 301 S.E.2d 615 (W.Va. 1983), cited above.

State v. White, 301 S.E.2d 615 (1983) (Per Curiam)

"An instruction to the jury is proper if it is a correct statement of the law and if sufficient evidence has been offered at trial to support it." Syl. pt. 8, *State v. Hall*, 298 S.E.2d 246 (W.Va. 1982).

Abstract proposition of law

State v. Ashcraft, 309 S.E.2d 600 (1983) (McGraw, C.J.)

Applies standard set forth in syl. pt. 7, *State v. Gangwer*, 286 S.E.2d 389 (W.Va. 1982). (Found in Vol. I under this topic.)

See HOMICIDE Instructions, Intent, (p. 227) for discussion of topic.

Accidental killing

State v. White, 301 S.E.2d 615 (1983) (Per Curiam)

See DEFENSES Accidental killing, (p. 86) for discussion of topic.

Accidental killing (continued)

State v. Evans, 310 S.E.2d 877 (1983) (McHugh, J.)

See DEFENSES Accidental killing, (p. 86) for discussion of topic.

Accomplice

Uncorroborated

State v. Hall, 304 S.E.2d 43 (1983) (Neely, J.)

See EVIDENCE Accomplice, Uncorroborated testimony, (p. 154) for discussion of topic.

Alibi

State v. Meadows, 304 S.E.2d 831 (1983) (McHugh, J.)

Alibi instruction offered by appellant was infirm because that particular alibi instruction has been found to impermissibly shift the burden of proof to a defendant. *State ex rel. Adkins v. Bordenkircher*, 517 F.Supp. 390 (S.D. W.Va.), affirmed, 674 F.2d 279, 282 (4th Cir, 1982) *cert. denied*, 103 S.Ct. 119 (1982).

State v. Kopa, 311 S.E.2d 412 (1983) (McHugh, J.)

See DEFENSES Alibi, (p. 87) for discussion of topic.

INSTRUCTIONS

Burden shifting

State v. Less, 294 S.E.2d 62 (1981) (McHugh, J.)

Syl. pt. 7 - Where the jury is permitted, but not required, to infer from the evidence that the defendant had the intent necessary for conspiracy to commit an offense against the State, and the jury is properly and adequately advised of the State's duty to prove that intent beyond a reasonable doubt, the giving of the instruction "that the jury may infer that a person intends to do that which he does, or which is the natural or necessary consequence of his act," is not error.

State v. Louk, 301 S.E.2d 596 (1983) (Harshbarger, J.)

In appeal from trial for first-degree murder and felonious assault, defendant contended it was error to give a State instruction which permitted malice to be inferred. The Supreme Court found it is unconstitutional to shift the burden of proof to a defendant on any element of a crime by instructing a jury to presume its existence from certain facts. Instructions about the "inference" of Malice, if supported by the evidence, are permissible.

State v. Kopa, 311 S.E.2d 412 (1983) (McHugh, J.)

See DEFENSES Alibi, (p. 87) for discussion of topic.

State v. Evans, 310 S.E.2d 877 (1983) (McHugh, J.)

Appellant was convicted of second degree murder. The appellant contended it was error to give State's instruction No. 5, whereby the jury was instructed that there is a permissible inference of fact that a man intends that which he does, or which is the immediate and necessary consequence of his act.

Syl. pt. 2 - "An instruction in a criminal trial which allows the jury to infer rather than presume the intent of the defendant avoids the shifting of the burden of proof and is therefore constitutionally permissible." Syl. pt. 3, *State v. Greenlief*, 285 S.E.2d 391 (W.Va. 1981).

Burden shifting (continued)

State v. Evans, (continued)

The Supreme Court found that in several recent cases they have held an instruction to be constitutionally permissible.

State v. Watson, 318 S.E.2d 603 (1984) (Miller, J.)

Appellant was convicted of breaking and entering. He contends the trial court erred in allowing State's instruction No. 5 which permitted the jury to infer an intent to commit larceny if they believed beyond a reasonable doubt that a larceny was committed.

Syl. pt. 10 - An instruction which permits a jury to infer, but states they need not so infer, a certain conclusion from an established set of facts does not create an impermissible burden-shifting presumption.

State v. Angel, 319 S.E.2d 388 (1984) (Per Curiam)

The trial court charged the jury that where a homicide is proved and presumption is murder in the second degree. The State has the burden to elevate the offense of first degree and the defendant has the burden to reduce the offense to manslaughter. The appellant contends this charge unconstitutionally shifted the burden of proof.

The Supreme Court found they had found a similar instruction to be constitutionally defective in prior cases. They noted, however, nearly identical language was proposed by the appellant.

The Court found the error was invited and therefore could not serve as a ground for reversal. See INVITED ERROR In general, (p. 316).

Retroactivity

See RETROACTIVITY Burden shifting, (p. 446) for discussion of topic.

INSTRUCTIONS

Cautionary "*Caudill*" instruction

State v. Cabalceta, 324 S.E.2d 383 (1984) (Per Curiam)

Appellant was convicted of manufacturing marijuana. Appellant contends the court erred in failing to properly instruct the jury on the evidence of Michael Hogan's and Linda Roach's guilty pleas.

The evidence of Hogan's plea of guilty to the misdemeanor of possession of marijuana and sentencing was elicited during cross-examination by the defense counsel. Over objection of the prosecutor, Hogan was asked about the nature of his agreement to cooperate with the State in exchange for the treatment under Code 60A-4-407. The judge overruled the objection and *sua sponte* gave an admonition to the jury. (The admonition advised the jury that the purpose of the impeachment evidence was to allow the jury to determine the weight or credibility to give to the testimony of the witness.) The instruction was given in the midst of cross-examination that was obviously designed to attack the witness' credibility by showing interest in giving testimony favorable to the State.

No cautionary instruction was given with regard to Linda Roach's testimony. She was cross-examined extensively about an agreement to testify against the appellant and the recommendation by the prosecutor that she be granted probation. She did not mention pleading guilty, but she did testify that probation was denied. Her lawyer was called as a defense witness. He confirmed that she had pleaded guilty and was presently undergoing a pre-sentencing evaluation. Thus, there was the possibility of being placed on probation. This testimony was elicited by the defense in an effort to impeach Roach's credibility.

The Court found in these circumstances, and in light of defense instruction C, there was no error in the failure to give a *Caudill* instruction. (Instruction C stated the State was relying on circumstantial evidence and testimony of a co-conspirator or accomplice and that the jury should receive such testimonies from the alleged co-conspirators or accomplices with great caution.)

INSTRUCTIONS

Circumstantial evidence

State v. Patton, 299 S.E.2d 31 (1982) (Per Curiam)

The appellant argued that the trial court erred in giving the State's instruction on circumstantial evidence. The Supreme Court found that the instruction complied with the law and was applicable to the facts of this case.

Coercive

State v. Spence, 313 S.E.2d 461 (1984) (Per Curiam)

See JURY Court's comments, (p. 330) for discussion of topic.

Collateral crimes

State v. Pancake, 296 S.E.2d 37 (1982) (Harshbarger, J.)

See EVIDENCE Collateral crimes, (p. 158) for discussion of topic.

Compulsion or coercion

State v. Tanner, 301 S.E.2d 160 (1982) (Harshbarger, J.)

See DEFENSE Compulsion or coercion, (p. 89) for discussion of topic.

Confusing/incorrectly states the law

State v. Less, 294 S.E.2d 62 (1981) (McHugh, J.)

Trial judge's action amending State's instruction showed neither bias nor prejudice where judge believed the instruction was not a correct statement of the law.

Confusing/incorrectly states the law (continued)

State v. Richey, 298 S.E.2d 879 (1982) (Miller, C.J.)

Applies standard set forth in syl. pt. 4, *State v. Stone*, 268 S.E.2d 50 (W.Va. 1980). (Found in Vol. I under this topic.)

See SEXUAL ASSAULT Instructions, (p. 549) for discussion of topic.

State v. White, 301 S.E.2d 615 (1983) (Per Curiam)

Although it was inartfully worded, State's instruction correctly set forth the elements of both voluntary manslaughter and murder in the second degree. The instruction did not incorrectly state the law and the trial judge did not commit error in giving the instruction over objection.

State v. Williams, 305 S.E.2d 251 (1983) (McGraw, C.J.)

Appellant contended the trial court erred in giving a state instruction informing the jury of the circumstances in which they might return a verdict of guilty based on circumstantial evidence, and a state instruction informing the jury of the circumstances in which they might find the appellant guilty of felony-murder. The Supreme Court found there was sufficient evidence to warrant submission of these issues to the jury, and since both instructions contained accurate statements of the law, there was no error.

State v. Simmons, 309 S.E.2d 89 (1983) (Miller, J.)

Syl. pt. 4 - "Proffered instructions which do not correctly state the law, which are at variance with the charge in the indictment, which are not supported by the evidence, or which are abstract, are erroneous and should be refused" syl. pt. 3, *State v. Starr*, 216 S.E.2d 242 (W.Va. 1975).

See INSTRUCTIONS Diminished capacity, (p. 302) for discussion of topic.

Confusing/incorrectly states the law (continued)

State v. Lambert, 312 S.E.2d 31 (1984) (McGraw, J.)

"Proffered instructions which do not correctly state the law, which are at variance with the charge in the indictment, which are not supported by the evidence, or which are abstract, are erroneous and should be refused" syl. pt. 3, *State v. Starr*, 216 S.E.2d 242 (W.Va. 1975).

Court's responsibility for

State v. Less, 294 S.E.2d 62 (1981) (McHugh, J.)

See INSTRUCTIONS Confusing/incorrectly states the law, (p. 298) for discussion of topic.

State v. Lambert, 312 S.E.2d 31 (1984) (McGraw, J.)

Appellant was convicted of welfare fraud. Her sole defense went to criminal intent. The appellant and her husband received public assistance based upon their mutual unemployment. Her husband subsequently became employed but neither of them reported this to the Department of Welfare. The appellant's defense at trial was that she feared physical abuse if she reported the changed circumstances. The appellant chronicled a history of violence directed against her by her husband. Her testimony concerning her husband's physical abuse was corroborated by two witnesses.

Applies standard set forth in syl. pt. 1, *State v. Tanner*, 301 S.E.2d 160 (W.Va. 1982). (Found in Vol. I under, DEFENSES Compulsion or coercion.)

The Supreme Court found the appellant's testimony was not uncorroborated and was sufficient to warrant the giving of a coercion instruction to the jury. However, the appellant offered an incorrect statement of the coercion defense and it was refused. The Court found the record did not reflect that any attempt was made by the appellant to either offer another coercion instruction or amend the instruction that was refused.

Court's responsibility for (continued)

State v. Lambert, (continued)

In *State v. Vance*, 250 S.E.2d 146, 151 (W.Va. 1978), it was stated, "as a general rule trial courts have no duty to give instructions *sua sponte* on collateral issues not involving an element of the offense being tried." The Supreme Court found this rule also applies when, after the rejection of a proposed instruction on a collateral issue, a defendant fails to amend or offer a new instruction properly defining the law on the collateral issue.

"As a general rule, a trial court is under no duty to correct or amend an erroneous instruction, but where, in a criminal case, a defendant has requested an instruction, defective in some respect, on a pertinent point vital to his defense, not covered by any other charges, and which is supported by uncontradicted evidence; and because of the state of the evidence relied upon for conviction, and the peculiar facts and circumstances of the case, a failure to instruct on this important point, may work a miscarriage of justice, it is error for the trial court not to correct the instruction and give it in proper form." Syl., *State v. Brown*, 107 W.Va. 60, 146 S.E. 887 (1929).

The Supreme Court noted that ultimately, the responsibility to ensure in criminal cases that the jury is properly instructed rests with the trial court.

The Supreme court found that the appellant's sole defense went to negate criminal intent, an element of the crime charged, and therefore a non collateral issue. The Court found that not only are defendants entitled to present evidence to support such theories as the battered spouse syndrome, which negate criminal intent, they are also entitled to receive proper instructions on those theories. The Court found the absence of a proper instruction on coercion left the jury with no criteria with which to determine whether criminal intent had been negated. The conviction was reversed.

Cumulative

State v. Manns, 329 S.E.2d 865 (1985) (Miller, J.)

The Court found rejection by a trial court of a duplicate instruction is not error.

INSTRUCTIONS

Curative

State v. Jackson, 298 S.E.2d 866 (1982) (Harshbarger, J.)

See SELF-INCRIMINATION - STATEMENT BY DEFENDANT Statements to court-appointed psychiatrist, (p. 490) for discussion of topic.

Diminished capacity

State v. Simmons, 309 S.E.2d 89 (1983) (Miller, J.)

The appellant contended the court erred in refusing to give a defense instruction which in substance stated that if the jury believed the defendant was suffering from a mental illness it could consider this fact in determining whether "the prosecution has proved beyond a reasonable doubt that the defendant did in fact act with premeditation, deliberation, and malice as those terms have been defined."

The Supreme Court did not believe the trial court erred in rejecting the instruction. The Court noted it appeared the instruction was an attempt to utilize the diminished capacity defense, and that for purposes of this case, they did not need to decide whether a diminished capacity defense is available in this jurisdiction since even if it were, the appellant's proof did not meet that standard.

The Supreme Court noted that the diminished capacity defense is designed to permit a defendant to introduce expert testimony regarding his impaired mental condition to show that he was incapable of forming a specific criminal intent. It is usually used to negate the elements of premeditation and deliberate intent in first degree murder or malice aforethought in second-degree murder. The Court noted the reason for allowing a defendant to assert the defense of diminished capacity is to permit the jury to determine if the defendant should be convicted of some lesser degree of homicide because the requisite mental intent to commit first or second degree murder is not present by virtue of the defendant's mental disease or defect.

The Supreme Court found in this case, the defendant did not offer any psychiatric testimony to the effect that by virtue of some mental disease or defect, she was incapable of forming the specific intent requires either for first or second degree murder.

Diminished capacity (continued)

State v. Simmons, (continued)

The Court also found the instruction as worded was not a correct statement of the diminished capacity defense. The instruction stated if the defendant was suffering from a mental illness at the time she allegedly committed the crime, then the jury could consider the mental illness on the question of whether she acted "with premeditation, deliberation, and malice." The Supreme Court found the existence of a mental illness is not alone sufficient to trigger a diminished capacity defense. The Court found it must be shown by psychiatric testimony that some type of mental illness rendered the defendant capable of forming the specific intent element and the instruction should require the jury to determine whether, in light of the mental condition, they believed that the defendant lacked the capacity to form the specific intent. The Supreme Court concluded that since the instruction was not supported by the evidence and did not correctly state the law, the circuit court properly refused it.

Felony murder

Lesser included offense

State v. Manns, 329 S.E.2d 865 (1985) (Miller, J.)

See HOMICIDE Felony murder, Lesser included offense, (p. 224) for discussion of topic.

Flight

State v. Hall, 298 S.E.2d 246 (1982) (McHugh, J.)

The trial court instructed the jury that, in determining the question of the guilt or innocence of the appellant, they could take into consideration the flight of the appellant after the commission of the crime.

Flight (continued)

State v. Hall, (continued)

The Court in *State v. Payne*, 280 S.E.2d 72 (W.Va. 1981) held "[t]hat evidence of flight is admissible upon a criminal trial in an almost universal rule." The Supreme Court found that in this case the instruction was proper and not misleading.

State v. Richey, 298 S.E.2d 879 (1982) (Miller, C.J.)

See EVIDENCE Flight, (p. 164) for discussion of topic.

Given in defense language

State v. Williams, 305 S.E.2d 251 (1983) (McGraw, J.)

The trial court refused appellant's instructions on presumption of innocence, burden of proof and reasonable doubt finding they were adequately covered by instructions offered by the State. The appellant alleged he was entitled to have them read to the jury in his own language.

The Supreme Court found a defendant may have the right to have an instruction given in his own language provided there are facts in evidence to support the instruction, that the instruction contains a correct statement of the law and that the instruction is not vague, ambiguous, obscure, irrelevant or calculated to mislead the jury. *State v. Evans*, 33 W.Va. 417, 10 S.E. 792 (1890). Where however, both the State and the defendant have offered instructions which in form and effect embody the same legal principle and amount to the same thing, it is not reversible error for the trial court to give one instruction and refuse the other. *State v. Hamric*, 151 W.Va. 1, 151 S.E.2d 252 (1966); *State v. Rice*, 83 W.Va. 409, 98 S.E. 432 (1919). After reviewing the instructions proffered by the appellant and those given by the trial court at the request of the State, the Court found no reversible error in the trial court's refusal of appellant's instructions.

INSTRUCTIONS

Homicide

State v. Guthrie, 315 S.E.2d 397 (1984) (Harshbarger, J.)

See INSTRUCTIONS Repetitious, (p. 312) for discussion of topic.

Identification

State v. Gravely, 299 S.E.2d 375 (1982) (McHugh, J.)

See IDENTIFICATION Instructions, (p. 242) for discussion of topic.

Insanity

State v. Bias, 301 S.E.2d 776 (1983) (Harshbarger, J.)

See INSANITY Instructions, (p. 288) for discussion of topic.

Lesser included offense

State v. Neider, 295 S.E.2d 902 (1982) (Miller, C.J.)

See LESSER INCLUDED OFFENSE In general, (p. 374); ROBBERY Instructions, Lesser included offense, (p. 452) for discussion of topic.

State v. Ruddle, 295 S.E.2d 909 (1982) (Per Curiam)

Applies standard set forth in syl. pt. 2, *State v. Neider*, 295 S.E.2d 902 (W.Va. 1982), cited in LESSER INCLUDED OFFENSE In general, (p. 374).

See CONTROLLED SUBSTANCES Instructions, Lesser included offense, (p. 78) for discussion of topic.

INSTRUCTIONS

Manslaughter

See HOMICIDE Instructions, manslaughter, (p. 228) for discussion of topic.

Not guilty

State v. Patton, 299 S.E.2d 31 (1982) (Per Curiam)

The appellant contended the trial court erred in refusing to give defendant's instruction which would have instructed the jury to find the defendant not guilty. The Supreme Court found that instruction was not justified by the evidence.

State v. Williams, 305 S.E.2d 251 (1983) (McGraw, C.J.)

Appellant was convicted of murder, arson and robbery. Appellant alleged that the trial court erred in refusing appellant's instructions to find the appellant not guilty. The Supreme court found there was sufficient evidence to warrant submission of the case to the jury.

Not supported by the evidence

State v. Schaefer, 295 S.E.2d 814 (1982) (Per Curiam)

See HOMICIDE Instructions, Not supported by the evidence, (p. 229) for discussion of topic.

State v. Sparks, 298 S.E.2d 857 (1982) (Per Curiam)

See SELF-INCRIMINATION - STATEMENTS BY DEFENDANT Voluntariness, Who determines, (p. 536) for discussion of topic.

Not supported by the evidence (continued)

State v. White, 301 S.E.2d 615 (1983) (Per Curiam)

An instruction correctly stating the law regarding accidental killing was correctly refused where no evidence was introduced to support the theory.

Where testimony of eyewitnesses could not support a finding of accidental killing and defendant did not testify, there was insufficient evidence to support defendant's accidental death instruction. Trial judge was correct in refusing the instruction.

State v. Gum, 309 S.E.2d 32 (1983) (McGraw, C.J.)

"Jury instructions on possible verdicts must only include those crimes for which substantial evidence has been presented upon which a jury might justifiable find the defendant guilty beyond a reasonable doubt." Syl. pt. 5, *State v. Demastus*, 270 S.E.2d 649 (W.Va. 1980).

"An instruction to the jury is proper if it is a correct statement of the law and if sufficient evidence has been offered at trial to support it. Syl. pt. 8, *State v. Hall*, 298 S.E.2d 246 (W.Va. 1982)." Syl. pt. 1, *State v. White*, 301 S.E.2d 615 (W.Va. 1983).

See HOMICIDE Instructions, Not supported by the evidence, (p. 230) for discussion of topic.

State v. Simmons, 309 S.E.2d 89 (1983) (Miller, J.)

See INSTRUCTIONS Diminished capacity, (p. 302) for discussion of topic.

Prompt presentment to magistrate

State v. Guthrie, 315 S.E.2d 397 (1984) (Harshbarger, J.)

Defendant's instruction No. 27A, dealing with the delay in presentment to a magistrate, was rejected as an inaccurate statement of the law.

INSTRUCTIONS

Prompt presentment to magistrate (continued)

State v. Guthrie, (continued)

The instruction read:

Based on *State v. Persinger*, 286 S.E.2d 261 (W.Va. 1982), the Supreme court noted that delay is an important factor in the totality of circumstances that may be considered in assessing whether a confession was voluntarily made and thus admissible. The Court noted that *Persinger* acknowledges that in egregious situations delay may result in an inadmissible confession. The Supreme Court found the instruction in this case improper because it did not require that the delay be for the purpose of eliciting a confession.

"The Court instructs the jury that the law requires the police to have taken George Guthrie without an unreasonable delay before a magistrate in the county where he was arrested, and if you the jury should find that the delay by C.M. Blizzard in taking George Guthrie before a magistrate was unreasonable, then you may disregard the statement in its entirety.

Reasonable doubt

State v. Patton, 299 S.E.2d 31 (1982) (Per Curiam)

The appellant assigned as error two reasonable doubt instructions proffered by the State and given by the trial court. The Supreme Court found that the two instructions were clearly contrary to what the court said with regard to reasonable doubt in *State v. Keffer*, 281 S.E.2d 495 (W.Va. 1981) and should not be given again. However, the Supreme court found that the record indicated that the court below gave nine other instructions which in some context correctly stated the law relating to reasonable doubt. At least two of those instructions directly and correctly defined reasonable doubt.

State v. Ashcraft, 309 S.E.2d 600 (1983) (McGraw, C.J.)

The appellant contended the trial court erred in refusing to give certain instruction proffered by the defense. One was an elaboration upon the reasonable doubt standard necessary to convict a criminal defendant.

Reasonable doubt (continued)

State v. Ashcraft, (continued)

The Supreme Court found no error in the refusal of this instruction since the Court has consistently discouraged the use of the instructions which attempt to define reasonable doubt beyond the standard charge.

State v. Evans, 310 S.E.2d 877 (1983) (McHugh, J.)

The appellant was convicted of second degree murder. His instruction No. 15, which was refused by the trial court, would have told the jury that "[a] verdict of 'not guilty' in a criminal case such as the one on trial does not necessarily mean that the innocence of the defendant has bee proved, such a verdict means only that guilt of the defendant has not been established beyond a reasonable doubt."

The Supreme Court found the instruction on its face was unrelated to any "theory" of the case and that the jury was properly and adequately instructed on the application of the reasonable doubt standard. Therefore, the Court found no error in the refusal of the instruction.

State v. Peyatt, 315 S.E.2d 574 (1983) (McHugh, J.)

The appellant alleged the trial court erred when it gave the jury certain instructions proffered by the prosecution in which it attempted to define reasonable doubt. Two of the instructions were disapproved by the Court in *State v. Keffer*, 281 S.E.2d 495 (W.Va. 1981).

The Supreme Court found in this case there were many other instructions offered to the jury defining reasonable doubt including a State instruction and four defense instructions. The Court concluded the instructions complained of did not warrant reversal of the appellant's conviction. (See case for instructions given).

Reasonable doubt (continued)

State v. Beckett, 310 S.E.2d 883 (1983) (Miller, J.)

The appellant alleged it was error for the trial court to give State's instruction No. 4 which instructed that proof beyond a reasonable doubt means the jury "can say that they have an abiding conviction of the truth of the charge contained in the indictment." The Supreme Court found they concluded in *State v. Starr*, 216 S.E.2d 242, 267 (W.Va. 1975), that while such an instruction probably confuses rather than helps the jury, it was not reversible error. The Supreme Court found that since several other traditional reasonable doubt instructions were given on behalf of the defendant, they declined to find any error based upon this instruction.

Recommendation of mercy

State v. Schofield, 331 S.E.2d 829 (1985) (Neely, C.J.)

Syl. pt. 6 - The trial court's sentencing instruction was valid where it stated that the defendant, upon a first-degree murder conviction without recommendation of mercy, would be sentenced to prison for life even though the trial court omitted the phrase "without possibility of parole" since the instruction was not misleading and counsel made no objection to the instruction.

Repetitious

State v. Less, 294 S.E.2d 62 (1981) (McHugh, J.)

Court's failure to give defendant's instruction relating to the elements of the crime of conspiracy was not an error because the instruction was repetitious of other instructions.

"Instructions that are repetitious . . . should not be given to the jury by the trial court." Syl. pt. 7, *State v. Cokeley*, 226 S.E.2d 40 (W.Va. 1976).

Repetitious (continued)

State v. Ray, 298 S.E.2d 921 (1982) (Miller, C.J.)

Applies standard set forth in syl. pt. 4, *State v. Helmick*, 286 S.E.2d 245 (W.Va. 1982). (Found in Vol. I under this topic.)

State v. Louk, 301 S.E.2d 596 (1983) (Harshbarger, J.)

Defendant contended on appeal the trial court erred in failing to give certain defense instructions. The Supreme Court found these instructions were repetitious of other instructions given and need not have been given.

State v. Meadows, 304 S.E.2d 831 (1983) (McHugh, J.)

Syl. pt. 6 - "Instructions that are repetitious or are not supported by the evidence should not be given to the jury by the trial court." Syllabus point 7, *State v. Cokeley*, 226 S.E.2d 40 (W.Va. 1976).

Appellant's instruction No. 21 instructing the jury to find appellant not guilty if the state failed to prove beyond all reasonable doubt that appellant was at the scene of the crime was repetitious of instruction 16 informing the jury of the necessity of the State's proving the actual presence of appellant at the time and place the crime was committed and if a reasonable doubt existed, acquittal was proper.

State v. Williams, 305 S.E.2d 251 (1983) (McGraw, C.J.)

See INSTRUCTIONS Given in defense language, (p. 304) for discussion of topic.

State v. Gum, 309 S.E.2d 32 (1983) (McGraw, C.J.)

Applies standard set forth in syl. pt. 4, *State v. Bingham*, 42 W.Va. 234, 24 S.E. 883 (1896). See *State v. Lott*, 289 S.E.2d 739 (W.Va. 1982). (Found in Vol. I under this topic.)

Repetitious (continued)

State v. Ashcraft, 309 S.E.2d 600 (1983) (McGraw, C.J.)

The appellant contended the trial court erred in refusing to give certain instructions proffered by the defense. The Supreme Court found that three of the proffered instructions were covered by instructions given by the court and were therefore properly refused.

The appellant contended the trial court erred in refusing to give certain instructions proffered by the defense. One instruction attempted to explain the intent necessary to convict a defendant as an aider and abettor, and to relate such intent to the appellant's theory of self-defense.

The Supreme Court found that the appellant's theory that he acted in self-defense and possessed no intent to kill was adequately presented in the court's charge and there was no error in refusal of the proffered instruction.

State v. Guthrie, 315 S.E.2d 397 (1984) (Harshbarger, J.)

The appellant alleged the trial court erred in refusing his instruction 33:

> The court instructs that if you believe that John Corprew may have fired the shot that killed David Cloud, then you must find George Guthrie not guilty.

The trial court found the instruction was repetitive and refused it. He gave Defense instruction 32:

> The court instructs the jury that if you Have reasonable doubt as to who fired the Shotgun in this case, then you must find George Guthrie not guilty.

The Supreme Court found it was not reversible error for the trial court to refuse the repetitious instruction.

INSTRUCTIONS

Substantial evidence test to offer instruction

State v. Phelps, 310 S.E.2d 863 (1983) (Per Curiam)

See SELF-DEFENSE Instructions, (p. 480) for discussion of topic.

Sufficient evidence to support

State v. Hall, 298 S.E.2d 246 (1982) (McHugh, J.)

An instruction to the jury is proper if it is a correct statement of the law and if sufficient evidence has been offered at trial to support it. *State v. Painter*, 135 W.Va. 106, 625 S.E.2d 86 (1950).

Sufficient evidence was offered at trial for the giving of instructions on aiding in concealing the stolen items.

Uncorroborated testimony

State v. Gravely, 299 S.E.2d 375 (1982) (McHugh, J.)

See IDENTIFICATION Instructions, (p. 242) for discussion of topic.

State v. Watson, 318 S.E.2d 603 (1984) (Miller, J.)

Appellant was convicted of breaking and entering the home of Albert Merandi. Merandi's daughter, Miranda, was home at the time and saw someone at the bottom of a set of stairs. She phoned her father who drove home from work. As he approached the house he saw a person in the alley behind the residence. Miranda and her father identified the appellant at the trial.

Appellant contended the trial court erred in refusing to give his instruction dealing with identification. He claims his presence in the Merandi home rested on uncorroborated and contradicted testimony of Miranda.

Uncorroborated testimony (continued)

State v. Watson, (continued)

The Supreme Court found the only evidence placing the appellant in the Merandi home was that of Miranda. The appellant denied being in the home and claimed he was in the neighborhood visiting a girlfriend. The Court found the father's testimony was not inconsistent with the appellant's story. The Court found the identification was contradicted and was not corroborated to the extent that would justify a refusal of a defense identification instruction. The Court found there were other factors casting doubt on the identification - the age of Miranda (eleven) and the fact she did not observe the intruder for any appreciable length of time, and the fact there was some suggestiveness involved with the photo array. (See IDENTIFICATION Suggestive identification, Suggestive photo array, (p. 255)). The Court found under these circumstances the appellant was entitled to a proper instruction on the identification issue. The Court found the instruction offered by the appellant was not a proper instruction and noted an approved instruction set forth in footnote 1, *State v. Payne*, 280 S.E.2d 72 (W.Va. 1981). The Court set forth a more simplified instruction in footnote 16 of this case.

INTENT

In general

State v. Breeden, 329 S.E.2d 71 (1985) (Per Curiam)

Syl. pt. 2 - "Where . . . the specific intent to accomplish a particular purpose is an essential element of the crime, it is necessary to establish the fact of that intent beyond a reasonable doubt, an while such intent may be established by existing circumstance, these must be wholly inconsistent with the theory of innocence." Syllabus point 4, in part, *State v. McHenry*, 93 W.Va. 396, 117 S.E. 143 (1923).

INVITED ERROR

In general

State v. Angel, 319 S.E.2d 388 (1984) (Per Curiam)

The trial court gave a burden shifting instruction in its charge to the jury. The language of the instruction was nearly identical to a charge proposed by the appellant. See INSTRUCTIONS Burden shifting (p. 295).

Syl. pt. 6 - "A party cannot, by its own instruction, invite error and the complain of such error on appeal." Syl. pt. 7, *State v. Woods*, 155 W.Va. 344, 184 S.E.2d 130 (1971).

The Court found in *State v. Dozier*, 255 S.E.2d 552 (W.Va. 1979) they suggested the "invited error" doctrine was limited to those cases "where the error is truly invited as a part of a trial strategy or tactic". The Court found there was no doubt the defense attorney exploited the language of the instruction in an effort to gain a strategical advantage. The Court found the instruction was woven into the defense counsel's closing argument in an attempt to use it to the defendant's benefit.

The Court found the error was invited and could not serve as a ground for reversing the conviction.

JOINDER - SEVERANCE AND ELECTION

No notice to prosecution

Cline v. Murensky, 322 S.E.2d 702 (1984) (McHugh, C.J.)

An altercation took place at a nightclub owned by the petitioners. The petitioners entered pleas of guilty at 4 a.m. in magistrate court to brandishing a weapon. The prosecutor was not present at this hearing. The petitioners were later indicted by misdemeanor indictments for carrying a weapon without a license. The parties in this proceeding agree that the charges of brandishing a weapon and carrying a weapon without a license arose from the same criminal transaction.

Syl. pt. 2 - Where in magistrate court a petitioner was charged with and entered a plea of guilty to the misdemeanor offense of brandishing a weapon, *W.Va. Code*, 61-7-10 [1925], the State was no precluded from subsequently seeking an indictment and prosecuting that petitioner for the misdemeanor offense of carrying a weapon without a license, *W.Va. Code*, 61-7-1 [1975], where, although those two offenses arose from the same criminal transaction, the plea of guilty to brandishing a weapon was taken in magistrate court shortly after the offense were committed, and prior to the taking of that plea, the prosecuting attorney had no knowledge of or opportunity to attend that magistrate court proceeding.

Severance of offense for trial

State v. Clements, 334 S.E.2d 600 (1985) (Brotherton, J.)

Appellant was tried for two counts of kidnaping and two counts of murder. At trial, he moved for separate trials of the four offenses. The motion was denied.

Syl. pt. 8 - Where a defendant will not be prejudiced by a single, combined trial, the trial court should, in the exercise of its discretion, refuse the defendant's motion to sever.

Severance of offense for trial (continued)

State v. Clements, (continued)

The Court found the trial judge did not abuse his discretion in this case. The four counts were all based upon actions that formed a part of a common scheme or plan. Evidence that tended to prove or disprove one count would similarly go to prove or disprove the other three counts. The Court found severance of the four counts would have resulted in merely four separate trial involving the same set of facts.

JUDGES

NOTE: Since proceeding for violations of judicial canons are not proceedings in which court-appointed counsel is required, the section of the index titled JUDGES Sanctions for violations of judicial canons will no longer be updated.

Conduct

Fluharty v. Wimbush, 304 S.E.2d 39 (1983) (Per Curiam)

See DENIAL OF A FAIR TRIAL Conduct of trial judge, (p. 92) for discussion of topic.

Disqualification

State v. Flint, 301 S.E.2d 765 (1983) (McHugh, J.)

The appellant contended the trial judge erred in denying the motion to recuse himself. Appellant contended that because the trial judge had presided over the earlier trial of the appellant for the murder of another person, the judge was aware of certain information which would be used in appellant's trial for murder in this case. Appellant asserted that the judge should have disqualified himself pursuant to Canon 3(c)(1)(a) of the Judicial Code of Ethics.

Syl. pt. 6 - It is not error for a trial judge to preside over more than one criminal case involving the same defendant even though some of the facts are the same in each of the cases.

State ex rel. Green v. Dostert, 304 S.E.2d 675 (1983) (McGraw, C.J.)

Syl. pt. 1 - Pursuant to Rule XVII of the West Virginia Trial Court Rules for Courts of Record, when a written motion for disqualification of a judge is filed at least seven days in advance of the trial date set in the proceedings, the judge is required to proceed no further in the matter pending resolution of the motion by the Chief Justice of the Supreme Court of Appeals.

Disqualification (continued)

State v. Hodges, 305 S.E.2d 278 (1983) (McHugh, J.)

Appellant contended the trial judge's failure to recuse himself was error. He noted that in a divorce action in which he was a party the judge voluntarily recused himself because he had known both parties since childhood and that the judge recused himself from proceedings involving the appellant and the Wayne County Bank, in which the judge's family held stock. Applying the standard set forth in syl. pt. 14 of *Louk v. Haynes*, the Supreme Court found no substantial reasons tending to impair the trial judge's impartiality and affirmed his decision not to recuse himself.

"Where a challenge to a judge's impartiality is made for substantial reasons which indicate that the circumstances offer a possible temptation as to the average man as a judge not to hold the balance nice, clear and true between the State and the accused, a judge should recuse himself." Syl. pt. 14, *Louk v. Haynes*, 223 S.E.2d 780 (W.Va. 1976) (in part).

Carter v. Taylor, 310 S.E.2d 213 (1983) (Per Curiam)

See CONTEMPT Recusal of trial judge, (p. 68) for discussion of topic.

State ex rel. Hamstead v. Dostert, 313 S.E.2d 409 91984) (McGraw, J.)

See GRAND JURY Prosecutor's role, (p. 204) for discussion of topic.

JURY

Challenges

Causes

State v. Audia, 301 S.E.2d 199 (1983) (McHugh, J.)

The appellant claimed that the trial court deprived him of his right to a fair and impartial trial by refusing to dismiss a prospective juror for cause. During the individual *voir dire* the prosecuting attorney informed the court that he represented a prospective juror along with 30 to 40 other members of his family in a partition suit then pending in the circuit court. The prosecutor had never met the prospective juror but had only dealt directly with his sister.

Syl. pt. 3 - Where a prospective juror is one of a class of persons represented by the prosecuting attorney at the time of trial, but there has been no actual contact between that juror and the prosecutor, the existence of the attorney-client relationship alone is not *prima facie* grounds for disqualification of that juror.

"The true test as to whether a juror is qualified to serve on the panel is whether without bias or prejudice he can render a verdict solely on the evidence under the instructions of the court." Syl. pt. 1, *State v. Wilson*, 157 W.Va. 1036, 207 S.E.2d 174 (1974).

The Supreme Court found that perhaps the more prudent course by the trial court would have been to excuse the prospective juror, but its failure to do so was not an abuse of discretion.

State v. Simmons, 301 S.E.2d 812 (1983) (Per Curiam)

"When the defendant can demonstrate even a tenuous relationship between a prospective juror and any prosecutorial or enforcement arm of state government, defendant's challenge for cause should be sustained by the court. A defendant is entitled to a panel of 20 jurors who are free from exception, and if proper objection is raised at the time of impaneling the jury, it is reversible error for the court to fail to discharge a juror who is obviously objectionable. In any case where the trial court is in doubt, the doubt must be resolved in favor of the defendant's challenge, as jurors who have no relationship whatsoever to the state are readily available." *State v. West*, 157 W.Va. 209, 219, 200 S.E.2d 859, 866 (1973).

State v. Simmons, (continued)

When juror, during *voir dire*, disclosed that her brother was a member of the K-9 Corps at Huttonsville Correctional Center, a group that had taken an actual role in the investigation of the case and in the search of appellant's home for marijuana, the trial court committed reversible error when it overruled appellant's challenge for cause. Appellant claimed prejudice in that he was required to use one of his six peremptory strikes to eliminate the juror from the jury panel.

State v. Bennett, 304 S.E.2d 35 (1983) (Per Curiam)

Syl. pt. 1 - "In order that one who has formed or expressed an opinion as to the guilt or innocence of the accused may be accepted as a competent juror on such panel, his mind must be in condition to enable him to say on his *voir dire* unequivocally and without hesitation that such opinion will not effect his judgement in arriving at a just verdict from the evidence alone submitted to the jury on the trial of the case." Syl. pt. 2, *State v. Gargiliana*, 138 W.Va. 376, 76 S.E.2d 265 (1953), quoting syl. pt. 3, *State v. Johnson*, 49 W.Va. 684, 39 S.E. 665 (1901).

Appellant was charged with selling a controlled substance to an undercover policeman. Appellant had been convicted earlier that month of delivering marijuana to the same officer. During individual *voir dire* by the court, two prospective jurors revealed that they knew of appellant's prior conviction on another charge although they were not quite sure what the charge was. One other juror thought appellant had smuggled drugs into the jail. Two of these three prospective jurors indicated strong prejudice against drug use and drug offenders. Appellant's challenges for cause were overruled and the jurors had to be removed by peremptory strikes.

The Supreme Court found there was no abuse of discretion in the court's refusal to excuse prospective jurors merely because they were aware that appellant had been convicted on some other charge when each unequivocally stated that his knowledge would not effect his judgement in any way. However, the trial court did abuse its discretion and committed reversible

State v. Simmons, (continued)

error when it refused to strike a potential juror who was obviously of the opinion that appellant was probably guilty before hearing any evidence. Furthermore, the potential juror could not unequivocally state that she should base her verdict solely on the evidence at trial.

A potential juror who stated on *voir dire* that he was prejudiced against drug usage and thought that a person proved guilty of delivering controlled substances "ought to be hung"was quite likely so biased against persons in appellant's position that he should have been excused for cause.

State v. Meadows, 304 S.E.2d 831 (1983) (McHugh, J.)

Syl. pt. 8 - Where a prospective juror, upon individual questioning, indicated that he was a former penitentiary guard but had retired ten years before trial, it was not reversible error to permit him to be a juror where no prejudice was shown.

State v. White, 301 S.E.2d 615 (1983) (Per Curiam)

See JURY Qualifications, (p. 335) for discussion of topic.

State v. Gum, 309 S.E.2d 32 (1983) (McGraw, C.J.)

Appellant alleged the trial court erred in failing to strike a juror for cause because she allegedly overheard a conversation between the wife of a witness for the prosecution and a co-worker concerning the facts of the case. The trial court conducted a hearing at which both the juror and the wife of the State's witness, who were co-workers, testified that no conversation concerning the facts of the case took place and that the juror took no part in any conversation between the wife of the State's witness and the co-worker.

State v. Gum, (continued)

Applies standard set forth in syl. pt. 1, *State v. Wilson*, 157 W.Va. 1036, 207 S.E.2d 174 (1974). See *State v. Audia*, 301 S.E.2d 199 (W.Va. 1983) cited above.

The Supreme Court found the trial court's determination of the absence of bias or prejudice was supported by the evidence and its denial of the appellant's motion to strike for cause was proper.

State v. Beckett, 310 S.E.2d 883 (1983) (Miller, J.)

The appellant was convicted of aggravated robbery. On appeal he contended two potential jurors - a sister of Randolph County Magistrate and a brother of a Randolph County jailer - should have been removed fro cause based on their relationship with an employee in a law enforcement or prosecutorial agency.

The Supreme Court found the eligibility and qualifications of jurors in both civil and criminal cases are controlled by several statutes and by the adoption of the common law grounds for disqualification set out in *State v. Dushman*, 91 S.E. 809, 810 (W.Va. 1917):

> "(1) Kinship to either party within the ninth degree; (2) was arbitrator on either side; (3) that he has an interest in the cause; (4) that there is an action pending between him and the party; (5) that he has taken money for his verdict; (6) that he was formerly a juror in the same case; (7) that he is the party's master, servant, counselor, steward, or attorney, or of the same society or corporation with him; and causes of the same class or founded upon the same reason should be included."

Syl. pt. 1 - Once a party by a timely objection demonstrates that a juror has either a statutory or common law ground for disqualification, such juror should be removed for cause.

JURY

Challenges (continued)

Cause (continued)

State v. Beckett, (continued)

Syl. pt. 2 - "When a prospective juror is closely related by consanguinity to a prosecuting witness or to a witness for the prosecution, who has taken an active part in the prosecution or is particularly interested in the result, he should be excluded upon the motion of the adverse party." Syllabus Point 2, *State v. Kilpatrick*, 210 S.E.2d 480 (W.Va. 1974).

Syl. pt. 3 - "In a criminal case it is reversible error for a trial court to overrule a challenge for cause of a juror who is an employee of a prosecutorial or enforcement agency of the State of West Virginia." Syllabus Point 5, *State v. West*, 157 W.Va. 209, 200 S.E.2d 859 (1973).

The Supreme Court noted that syl. pt. 5, of *West* was limited to an "employee of a prosecutorial or enforcement agency," and that within the confines of the syl. pt. neither juror in this case was disqualified as they were not employees. Defense counsel, however, pointed to language in *West* that when the defendant demonstrates even a tenuous relationship between a prospective juror and any prosecutorial or enforcement arm of State government, the defendant's challenge for cause should be sustained.

The Supreme Court noted that the linkage in *West* of law enforcement and prosecutorial employees embodies two different classes of persons who are treated differently. The Court noted that most jurisdictions allow law enforcement officers to serve as jurors in criminal trials, absent a showing of actual bias or prejudice.

Syl. pt. 4 - A potential juror closely related by blood or marriage to either the prosecuting or defense attorneys involved in the case or to any member of their respective staffs or firms should automatically be disqualified.

State v. Beckett, (continued)

The Court decline to retreat from syl. pt. 5, *West*, but believed the tenuous relationship language in the text of *West* cannot be taken to mean that any juror who is either related by kinship or marriage to or is acquainted socially with an employee of a law enforcement agency is automatically disqualified for cause. The Court believed that upon disclosure of such a relationship the defendant must be permitted individual *voir dire* to determine any possible bias or prejudice arising from such relationship. The Court found an automatic disqualification does arise when the challenged juror has a close kinship with a law enforcement official who has taken an active part in the prosecution of the case being tried.

The Court found the employment of a prospective juror in a law enforcement or prosecutorial agency operates as a *per se* disqualification for cause if properly raised by counsel. However:

Syl. pt. 6 - A prospective juror's consanguinity, marital or social relationship with an employee of a law enforcement agency does not operate as a per se disqualification for cause in a criminal case unless the law enforcement official is actively involved in the prosecution of the case. After establishing that such a relationship exists, a party has the right to obtain individual *voir dire* of the challenged juror to determine possible prejudice or bias arising from the relationship.

The Supreme Court found that where, as in this case, the party does not seek additional *voir dire* to demonstrate possible bias or prejudice, there is no error in the court's refusal to strike such prospective jurors for cause.

State v. Guthrie, 315 S.E.2d 397 (1984) (Harshbarger, J.)

The appellant alleged the trial court erred in refusing to strike a juror for cause who indicated she had reservations about the efficiency of psychiatrist and psychologists.

State v. Guthrie (continued)

The Supreme Court noted they have found that if a defendant requests, a court should have jurors questioned about their prejudices or biases against persons suspected of having mental diseases or defects, and against psychiatrists or psychologists.

Here, the defense was permitted to ask such questions. (See case for questions asked and responses.)

The Supreme Court agreed with the State that it was not possible to tell whether there was a bias or prejudice that would prevent this venire woman from being impartial and fair because the questions were structured in a way that did not permit a fair evaluation of her response, and the record was not sufficiently developed to indicate cause to exclude her.

The Supreme Court found if there is a question of bias or prejudice about something other than a defendant's guilt or innocence, a defendant must show that the venire person would be able to pass judgement solely on the evidence and the court's instructions. (Cites omitted). The Court found nothing in the record indicated this juror would have been unable to render a fair verdict or listen impartially to the evidence. The Supreme Court found that if a defendant intends to dismiss a juror for cause, it must be proven that the juror's bias would interfere with the juror's ability to fairly evaluate the evidence and follow the law. The Court found the trial court did not err in refusing to strike this juror for cause.

State v. Wade, 327 S.E.2d 142 (1985) (McHugh, J.)

The appellant contends the trial court erred in refusing the appellant's challenges for cause of two prospective jurors. One prospective juror stated during *voir dire* that he knew one of the state's witnesses, and it was revealed that this prospective juror's wife worked for the private law office of two assistant prosecutors not involved in the actual jury trial of this case. The juror stated he was not that closely acquainted with the witness and that he

State v. Wade, (continued)

could render a fair and impartial verdict based on the evidence. The second prospective juror stated during *voir dire* that he was a close friend with a witness at the appellant's work-release revocation hearing - the hearing at which appellant allegedly committed false swearing. The Juror said he was predisposed to believe his friend's testimony, but that he could render a fair and impartial verdict on the evidence. The appellant used two of his peremptory challenges to remove the jurors from the panel.

Syl. pt. 4 - "The true test as to whether a juror os qualified to serve on the panel is whether without bias or prejudice he can render a verdict solely on the evidence under the instructions of the court." Syl. pt. 1, *State v. Wilson*, 157 W.Va. 1036, 207 S.E.2d 174 (1974).

Here, although appellant did not request additional individual *voir dire*, the trial judge examined the two prospective jurors concerning their possible prejudices. The Supreme Court was confident the two were not prejudiced or biased by their relationships. The Court found it would have been more prudent for the trial judge to strike the jurors, but the court did not err in denying the challenges for cause.

Jordan v. Holland, 324 S.E.2d 372 (1984) (Per Curiam)

Relator contends he was denied due process by the failure of the trial judge to strike certain jurors for cause. Relator moved to strike five members of the venire on the ground of friendship with police officers who were potential witnesses. The trial judge denied the motion, believing acquaintanceship with a potential witness is not cause for striking a prospective juror and that, upon questioning, including individual *voir dire*, these jurors demonstrated objectivity. The judge also questioned one potential juror who was employed by the Dept. of Welfare. She replied her job did not bring her into contact with the prosecutor's office, and that neither her position nor the fact that she was employed by the State would effect her ability to be a fair and impartial juror.

Challenges (continued)

Jordan v. Holland, (continued)

The Supreme Court found no error in the trial court's refusal to strike any of the jury venire for cause.

Juror bias as to the offense

State v. Bennett, 304 S.E.2d 35 (1983) (Per Curiam)

See JURY Challenges, Cause, (p. 322) for discussion of topic.

Juror knowledge of prior convictions

State v. Bennett, 304 S.E.2d 35 (1983) (Per Curiam)

See JURY Challenges, Cause, (p. 322) for discussion of topic.

Juror opinion of guilt or innocence

State v. Bennett, 304 S.E.2d 35 (1983) (Per Curiam)

See JURY Challenges, Cause, (p. 322) for discussion of topic.

Peremptory

State v. Clements, 334 S.E.2d 600 (1985) (Brotherton, J.)

Appellant contends that due to the pretrial publicity of the case he should have been granted additional peremptory challenges above the nine which he had. The Court found although the trial court could have granted further peremptory challenges in its discretion and for good cause shown, it was not error ro refrain from so doing.

JURY

Challenges (continued)

Peremptory (continued)

State v. Clements, (continued)

The appellant also alleged the prosecution used its peremptory challenges to strike jurors by race. The Court found it would not have mattered, however, if the State had used its strikes entirely along racial lines since the very concept of a peremptory challenge does not permit inquiry into the reasons for a strike. The Court found the United States Supreme Court has held the U.S. Constitution does not require an examination of a prosecutor's exercise of peremptory challenges, and specifically that the striking of Blacks in a particular case is not a denial of equal protection of the laws.

Court's comments

State v. Spence, 313 S.E.2d 461 (1984) (Per Curiam)

Appellant was convicted of grand larceny. The appellant contended the trial judge made improper remarks to the jury during the course of the trial and failed to instruct them of their right to maintain their conscientious convictions. The Supreme court found the record indicated the remarks made by the judge were designed to have the effect of expediting the trial. The Court agreed with the appellant's contention that the remarks had the effect of coercing a verdict.

The Court noted that in *State v. Hobbs*, 282 S.E.2d 258 (W.Va. 1981) they stated the general rule that whether a trial court's instruction constitute improper coercion of a verdict depends on the facts and circumstances of the case.

Here, the Supreme Court found the trial court's remarks amounted to improper coercion of the jury to reach a verdict within a time limit set by the judge. Throughout the trial the trial judge made remarks such as, "we are going to take as much evidence as we can. If I hadn't been so rash as to promise a bunch of you ladies and gentlemen and I'll stick to my promise, you will be out of here by noon, tomorrow," and "I am not attempting to punish you. I don't want to hold you unduly but I need your help."

Court's comments (continued)

State v. Spence, (continued)

After the jury had deliberated less than an hour, the court inquires of their progress. The foreman replied "no substantial progress." The trial judge stated, "now the court is not ordering you, but you have to reach a verdict. I am merely telling you what is contemplated in the eyes of the law, if it is possible to do it."

"I am going to give you ladies and gentlemen a few more minutes to see if you can resolve your differences by discussing them and if you can arrive at a verdict."

The Supreme Court found the trial court's remarks, when considered in their entirety throughout the course of the trial, had the effect of improperly coercing the jury to reach a verdict and to reach it quickly.

Deliberations

State v. Ray, 298 S.E.2d 921 (1982) (Miller, C.J.)

See SEXUAL ASSAULT Jury deliberations, (p. 550) for discussion of topic.

Discharge of juror

State v. Oldaker, 304 S.E.2d 843 (1983) (Harshbarger, J.)

Syl. pt. 6 - "The power of a court in a criminal case to discharge a jury without rendering a verdict is discretionary." Syllabus Point 2, in part, *State ex rel. Brooks v. Worrell*, 156 W.Va. 8, 190 S.E.2d 474 (1972).

The trial court did not abuse its discretion by refusing to dismiss a distraught juror upset because he had been served divorce papers. There was no alternate juror and the judge was reluctant to declare a mistrial once the trial had reached the jury instruction stage. The juror, after requesting a dismissal, voluntarily chose to finish the case and then be dismissed.

JURY

Discharge of juror (continued)

State v. Oldaker, (continued)

W.Va. Code 62-3-7 gives the court discretion to dismiss a single juror who is unable to perform or to discharge the entire jury if manifest necessity exists. "Under the provisions of the code and deciding cases . . .where unforeseeable circumstances arise during the trial of a case, the judge or counsel, *making the completion of the trial impossible*, a manifest necessity to discharge the jury will exist and the declaration of a mistrial will be justified. Code, 62-3-7, *State ex rel. Dandy v. Thompson*, 148 W.Va. 263, 134 S.E.2d 730, *State ex rel. Brooks v. Worrell*, 156 W.Va. 8, 190 S.E.2d 474 (1972). Though the juror in this instance was distraught, he was not incapacitated; thus, completion of the trial was possible.

Interference with juror

State v. Dye, 298 S.E.2d 898 (1982) (Per Curiam)

The defendant contended there was interference with a juror during trial. At the beginning of the fourth day of trial the Sheriff informed the trial judge that a juror in the case received a threatening phone call. It had been ascertained during *voir dire* of the jury that she had a brother serving a term in Moundsville. The phone call apparently threatened retribution against the juror's incarcerated brother. During the court's examination of the juror, the juror stated that the phone call would not prejudice her decision in the case.

The Supreme Court applied the standards set forth in syl. pt. 5, *State v. Williams*, 230 S.E.2d 742 (W.Va. 1976): "The trial court is charged with ascertaining in the first instance where there is bias or prejudice on the part of the juror and, although the opinion of a juror is entitled to consideration, it should not be taken as conclusive."

The Supreme Court found that under this standard, the trial court did not abuse its discretion in ruling that the juror was not biased or prejudiced against the defendant by the phone call.

JURY

Mercy

State v. Ray, 298 S.E.2d 921 (1982) (Miller, J.)

See SEXUAL ASSAULT Recommendation for mercy, (p. 552) for discussion of topic.

Municipal court

Champ v. McGhee, 270 S.E.2d 445 (1980) (Neely, J.)

Syl. - Under art. 3, § 14 of the West Virginia Constitution, the right to a jury trial is accorded in both felonies and misdemeanors when the penalty imposed involves any period of incarceration.

Relators were charged with violations of municipal ordinances. The crimes that which they were charged have sentences which include possible incarceration. The relators contend that the section of the municipal ordinance that provides that no jury shall be allowed in any trial for the violation of any municipal ordinance in the city is unconstitutional.

The Supreme Court found that any defendant in jeopardy of incarceration must affirmatively waive his right to a jury in writing before he may be tried and sent to jail without one. The court found if that judge signifies in advance of trial that the matter is administrative and notwithstanding provisions in the ordinance which permit a jail sentence, he will not impose one, the trial may proceed without a jury.

The Supreme Court found a full twelve - man jury will be required in municipal court when a jury must be provided.

The Supreme Court recognized that frequently serious misdemeanors are handled by municipal courts and noted that municipal courts have concurrent jurisdiction for these offenses in magistrate court. The Court noted that since the state constitution provides for a jury of six in magistrate court and provides the funds for paying jurors in magistrate court, the city constabularies can elect to secure a state warrant and prosecute in magistrate court where there is appropriate machinery for securing a jury.

JURY

Polling the jury

State v. Tennant, 319 S.E.2d 395 (1984) (Miller, J.)

The appellant contends his conviction should be reversed based on the actions of the trial court when the jury was polled.

Appellant was convicted of leaving the scene of an accident in isolation of *W.Va. Code* 17C-4-1. When the jury was polled, one juror responded his verdict was guilty, but he did not think they had enough evidence. After repeated questioning by the trial judge, the juror stated his verdict was guilty.

Syl. pt. 1 - Rule 31 of the West Virginia Rules of Criminal Procedure, which is modeled after Rule 31 of the Federal Rules of Criminal Procedure, mandates that the verdict in a criminal case be unanimous and provides a procedure for ensuring that the verdict is unanimous, i.e., the jury poll.

Syl. pt. 2 - Federal cases have held that the language of Rule 31(d) of the Federal Rules of Criminal Procedure requires that when a juror indicates in a pol that he either disagrees with the verdict or expresses reservations about it, the trial court must either direct the jury to retire for further deliberations or discharge the jury. Although the rule does not explicitly so state, courts have also recognized that appropriate neutral questions may be asked of the juror to clarify any apparent confusion, provided the questions are not coercive. We adopt this procedure for Rule 31(d) of the West Virginia rules of Criminal Procedure.

The Supreme Court found the reason for allowing only a very limited inquiry on an individual poll of jurors in a criminal case is to prevent the possibility of coercing the juror to conform to the verdict.

The Court noted the ability to have a final forum to determine whether each juror assents to the verdict is particularly important in light of the general rule forbidding post-trial impeachment of a jury's verdict by affidavit or other testimony of the jurors.

Polling the jury (continued)

State v. Tennant, (continued)

The Court found in this case the juror's statements clearly suggested she did not believe there was sufficient evidence to warrant a conviction. The Court found the trial court's repeated inquiry was coercive and the repeated questioning may have had the effect of compelling the juror to surrender her views. The Court found if the trial court has stated the verdict could not be accepted because it was not unanimous and had the jury return for further deliberations, there would have been no error. On the facts of this case, the Court found the trial court committed reversible error.

Qualifications

State v. Neider, 295 S.E.2d 902 (1982) (Miller, J.)

"The true test as to whether a juror is qualified to serve on the panel is whether without bias or prejudice he can render a verdict solely on the evidence under the instructions of the court." Syllabus point 1, *State v. Kilpatrick*, 210 S.E.2d 480 (W.Va. 1974)." Syl. pt. 3, *State v. Beck*, 286 S.E.2d 234 (W.Va. 1981).

See *VOIR DIRE* Individual, (p. 590) for discussion of topic.

State v. White, 301 S.E.2d 615 (1983) (Per Curiam)

Applies standards set forth in syl. pt. 3, *State v. Beck*, 286 S.E.2d 234 (W.Va. 1981), found in *State v. Neider*, 295 S.E.2d 902 (W.Va. 1982), cited above.

The trial judge's refusal to strike potential jurors who were acquainted with and/or had worked with defendant's arresting officer was not error where the record did not indicate that the veniremen to whom defense counsel objected were unable to render a verdict solely on the evidence adduced at trial.

JURY

Qualifications (continued)

State v. Toney, 301 S.E.2d 815 (1983) (Per Curiam)

Under *State v. Carduff*, 142 W.Va. 18, 93 S.E.2d 502 (1956), a juror is not disqualified to serve in a subsequent case merely because he previously served in a trial involving similar evidence and the same witnesses.

State v. Gum, 309 S.E.2d 32 (1983) (McGraw, J.)

See JURY Challenges, Cause, (p. 323) for discussion of topic.

State v. Beckett, 310 S.E.2d 883 (1983) (Miller, J.)

See JURY Challenges, cause, (p. 324) for discussion of topic.

Right to jury trial

Champ v. McGhee, 270 S.E.2d 445 (1980) (Neely, J.)

See JURY Municipal court, (p. 333) for discussion of topic.

Sequestration

State v. Young, 311 S.E.2d 118 (1983) (McGraw, C.J.)

The appellant contended the trial court erred in refusing to sequester the jury during the trial. The appellant moved for sequestration during the second day of individual *voir dire* when it became apparent that several of the prospective jurors had read an article published the previous day in the *Point Pleasant Register* discussing the appellant's initial conviction and his subsequent habeas corpus relief. The appellant again moved for sequestration at the beginning of the fourth day of trial, after the jury had been selected, but before the opening remarks of counsel. Both motions were denied.

Sequestration (continued)

State v. Young, (continued)

Syl. pt. 3 - It is a fundamental tenet of due process, guaranteed by the sixth and fourteenth amendments to the United States Constitution and by article III, sections 10 and 14 of the West Virginia constitution, that a criminal defendant is entitled to trial by an impartial and objective jury free from outside influence.

Syl. pt. 4 - In determining whether sequestration of the jury during trial of a felony is required as a matter of due process to prevent contamination of the verdict, numerous factors must be considered. These include: the nature of the crime with which the defendant is charged; the existence and pervasiveness of pretrial publicity provided by print and electronic media; whether any such publicity is prejudicial to the defendant; the existence of daily newspapers, or television or radio stations which can be expected to provide continuing media coverage of the trial; expressed public sentiment for or against the accused; the expected length of trial, the physical facilities of the courthouse where the trial will take place and whether they provide an exclusive means of ingress and egress for members of the jury; and any other factors which may be considered relevant in the issue of sequestration of the jury.

Syl. pt. 5 - Either party may move for sequestration of the jury prior to trial or at any time during the course of trial. Furthermore, in appropriate circumstances, sequestration is a matter which should be raised *sua sponte* by the trial court. When sequestration is requested by motion, counsel should provide the trial court with an adequate basis to support a finding that there is a reasonable probability that, absent sequestration, the jury will be exposed to outside influences which could improperly taint their verdicts. Once this initial showing is made, the burden falls upon the party opposing the motion to demonstrate that sequestration is not necessary to vindicate the due process guaranty of a fair trial by an impartial jury free from outside influences. The trial court's findings of fact and conclusions of law on the issue of sequestration shall be made a matter of record. Whenever sequestration shall be ordered pursuant to motion, the court in advising the jury of the decision, shall not disclose which party requested sequestration.

JURY

Sequestration (continued)

State v. Young, (continued)

In this case, the Supreme Court found that a majority of the Court could not conclude that the trial court abused its discretion in refusing to sequester the jury during trial. The showing made by the appellant in support of sequestration consisted primarily of a newspaper article. A majority of the Court did not believe the single newspaper report was sufficient to require sequestration.

Venire

State v. Bennett, 304 S.E.2d 28 (1983) (Per Curiam)

When the clerk called the jury roll, four veniremen were not present. The trial court directed that their names be passed over the names drawn, noting that there were 27 jurors present from which to draw a panel of 20. After *voir dire*, the parties exercised their strikes and the jury was sworn. The appellant then formally excepted to the panel because of the unexplained absence of those jurors.

Appellant contends the trial courts actions in effect allowed the State six strikes from the panel, and violated Rule XII, Trial Court Rules for Trial Courts of Record, because the reasons for the jurors' absence were not noted.

"Where a panel of twenty jurors, free from exception, is completed from those in attendance for the trial of a criminal case, the objection that, previous to the making up of such panel, the court had excused from attendance certain jurors on the original venire for that term of the court is not tenable." Syllabus point 2, *State v. Emblem*, 16 W.Va. 326, 33 S.E. 223 (1899).

The Supreme Court failed to see how passing over an absent jurors name in calling the panel could inure to the benefit of the State, and was of the opinion that the appellant's exception came too late.

JURY

Venire (continued)

State v. Bennett, (continued)

"A verdict will not be set aside for any irregularity in drawing, summoning or impaneling a jury unless properly objected to before the swearing of the jury or unless it is shown that the party making the objection was injured thereby." Syl. pt. 3, *State v. Hankish*, 147 W.Va. 123, 126 S.E.2d 42 (1962).

Since the appellant failed to show that he was injured by the omission of the jurors from the panel, the Supreme Court declined to disturb the judgement of the trial court.

State v. Clements, 334 S.E.2d 600 (1985) (Brotherton, J.)

Appellant was convicted of first degree murder and voluntary manslaughter. His second trial was held in Hancock County. Because of considerable pretrial publicity in Hancock County, the appellant requested a change of venire which was denied.

Syl. pt. 3 - The grant or denial of a motion for a change of venire due to adverse pretrial publicity is a matter within the sound discretion of the trial court and an abuse of this discretion will be found only where the defendant shows that the pretrial publicity has caused widespread hostility against him that a fair trial would not be.

The Court found only thirteen of the sixty-five prospective jurors had already formed an opinion and that in general there was not as much of a showing of widespread hostility toward the defendant in this case as in the case of *State v. Sette*, 242 S.E.2d 464 (W.Va. 1978) and that the trial judge did not abuse his discretion in denying the appellant's motion for a change of venire.

JUVENILES

Bail

State ex rel. M.C.H. v. Kinder, 317 S.E.2d 150 (1984) (Miller, J.)

Relators, age 7 and 9, were arrested on a delinquency charge of breaking and entering. According to the information in the petitions, the boys had been apprehended with approximately $12 worth of money, toys and candy in their possession. Their mother arrived at the police station where the boys had been taken initially, and went with them to the magistrate's office. The magistrate ordered both boys detained in secure confinement after they were unable to post a $5,000 bond set for each child.

The Supreme Court found where the underlying offense is serious and the committing official believes that less drastic alternatives to secure detention are not available, bail may be appropriate. They found it may also be used in less serious cases where there is a legitimate question whether a child will appear if released. The court found in this case, in view of the childrens' ages, their lack of any prior offenses, the nature of the acts charged, and the willingness of their mother to assume control, there was no need to require bail.

Care for substance abusers

State ex rel. M.K. v. Black, 318 S.E.2d 433 (1984) (McHugh, C.J.)

At the time this petition was filed, M.K. was a 16 year old committed to Lankin Hospital following a finding by a mental hygiene commissioner that she was mentally ill due to a drug addiction. The petition recited various professionals agrees placement in the Adolescent Unit of Lankin was inappropriate and restrictive for the treatment of this child. It was uncontested by the parties that a comprehensive substance abuse program was not available in West Virginia. The petitioner sought to compel the respondents to establish such a program for juveniles in the state.

The respondents agreed to the demands of the petitioner and the parties submitted stipulations and a plan outline they sought to have approved by the court.

JUVENILES

Care for substance abusers (continued)

State ex rel. M.K. v. Black, (continued)

Syl. - Under the provisions of *W.Va. Code*, 16-1-10(19) (1983), *W.Va. Code*, 27-1A-11 (1983), and *W.Va. Code* 27-5-9 (1977), the West Virginia Department of Health, through its Director and other personnel, has an affirmative duty to provide a comprehensive program for the care, treatment and rehabilitation of juvenile substance abusers.

After reciting the respondents' statutory duties to provide a program for juvenile substance abusers, the Supreme Court approved the parties stipulations and granted the writ of mandamus as moulded.

Confessions

State v. Howerton, 329 S.E.2d 874 (1985) (Miller, J.)

Appellant was convicted of committing second degree murder when he was seventeen. He contended an oral statement given to police was admitted in violation of a provision of our juvenile law dealing with the admissibility of extra judicial statements by juveniles.

Syl. pt. 2 - *W.Va. Code* 49-5-1(d) (1978), was designed to prohibit juveniles under the age of sixteen years from giving incriminating statements when in the custody and outside the presence of the child's counsel. We note that its provisions were altered in 1982.

The Court found it was clear in this case the defendant's oral confession is tested by the general standard relating to a juvenile's confession since the special statutory restriction is not applicable because the defendant was seventeen.

Syl. pt. 3 - "[Subject to the provisions of *W.Va. Code*, 45-9-1(d),] [t]here is no constitutional impediment which prevents a minor above the age of tender years solely by virtue of his minority from executing an effective waiver of rights; however, such waiver must be closely scrutinized under the totality of the circumstances." Syllabus point 1, as modified, *State v. Laws*, 162 W.Va. 359, 251 S.E.2d 769 (1978).

JUVENILES

Confessions (continued)

State v. Howerton, (continued)

The Court found syl. pt. 1 of *Laws* accurately reflects our current law when the following phrase is added: "Subject to the provisions of *W.Va. Code*, 49-5-1(d)."

The Court noted they also set out in *Laws* a number of factors that should be considered in ascertaining whether a juvenile's confession should be admitted.

Footnote 8 - In *Laws* 1162 W.Va. at 363, 251 S.E.2d at 772, we stated:

> "[A]ny confession made by a minor must be scrutinized under the totality of the circumstances which includes an evaluation of the following factors: 1) age of the accused; 2) education of the accused; 3) knowledge of the accused as to both the substance of the charge, if any has been filed, and the nature of his rights to consult with an attorney and remain silent; 4) whether the accused is held incommunicado or allowed to consult with relatives, friends or an attorney; 5) whether the accused was interrogated before or after formal charges had been filed; 6) methods used in interrogation; 7) length of interrogations; 8) whether *vel non* the accused refused to voluntarily give statements on prior occasions; and 9) whether the accused has repudiated an extra judicial statement at a later date." (Citation omitted).

The Court found the appellant did not contend his oral confession was invalid under the foregoing totality rule.

Voluntariness

State v. Manns, 329 S.E.2d 865 (1985) (Miller, J.)

Appellant was convicted of first degree murder with a recommendation of mercy. The crime occurred one hour before the appellant's eighteenth birthday. Appellant contended that since he was just eighteen at the time the

JUVENILES

Confessions (continued)

Voluntariness (continued)

State v. Manns, (continued)

crime was committed, his confession, given when he was nineteen years and four months old, must be judged by the juvenile standards under *W.Va. Code*, 49-5-1(d). The Court found that even if this statute was applicable to the defendant, it does not prohibit all juvenile confessions, but rather sets certain specified standards, based on the age of the juvenile, when extra judicial statements are inadmissible. The Court found since the defendant was over sixteen years of age at the time of his confession, he was not entitled to the protections of *W.Va. Code* 49-5-1(d).

Applying the standards set forth in syl. pt. 3, *State v. Howerton*, 329 S.E.2d 874 (W.Va. 1985), the Court found the defendant was nineteen, mentally competent, sober and not physically constrained at the time of the confession. The Court found there was no evidence concerning any promises made to the defendant nor was there any claim that the defendant was physically or verbally induced by the officers to confess. The Court found in view of the totality of the circumstances, the defendant voluntarily and intelligently waived his rights and subsequently gave a confession that was properly admitted into evidence. The court found the appellant's reliance on *State ex rel. J.M. v. Talyor*, 276 S.E.2d 199 (W.Va. 1981), is misplaced. The Court found in *Taylor*, they analyzed a juveniles ability to waive the right to counsel at a proceeding, which must be distinguished from the capacity of a juvenile to give a voluntary confession, as discussed in *State v. Laws*, 162 W.Va. 359, 251 S.E.2d 769 (1978).

Appellant also contends that before he confessed he should have been advised that after a juvenile transfer hearing, he might be subject to adult criminal prosecution. The Court found, assuming *arguendo*, that the defendant should be considered a juvenile even though he was over nineteen years of age at the time of the arrest and confession, the general rule is that in the absence of a statute, a law enforcement officer is not required to inform a juvenile that he might subsequently be tried as an adult. The possibility that a juvenile does not understand the transfer procedure is another factor in applying the totality of the circumstances test to a juvenile's confession.

JUVENILES

Confinement

Cruel and unusual punishment

State ex rel. J.D.W. v. Harris, 319 S.E.2d 815 (1984) (McHugh, C.J.)

Two residents of a juvenile correction facility located in Harrison county filed petitions for writs of habeas corpus alleging that as victims of mistreatment at the facility they have been subjected to cruel and unusual punishment. The Supreme Court found that although the relators were not subject to the specific misconduct alleged at the time these cases were heard, the Court had jurisdiction to issue a ruling since the misconduct alleged is capable of repetition. See MOOTNESS Capable of repetition, (p. 386).

The Supreme Court noted that based on the standards set forth in *State ex rel. K.W. v. Werner*, 242 S.E.2d 907 (1978) and *W.Va. Code*, 49-5-16a (1978), J.D.W.'s rights would have been violated if, in fact, his allegation of an unprovoked attack by the correctional officer is true. The Court found the respondent admitted that K.R. was locked alone in his room for an extended period of time during which the relator was "out of control". See *W.Va. Code* 49-5-16a(3) (1978).

The Court concluded the records in these cases were insufficiently developed and ordered the cases transferred to the circuit court of Kanawha County for the purpose of developing the facts surrounding the alleged misconduct on the part of the staff of the juvenile correctional facility toward the individual relators and to determine whether such misconduct violated their constitutional and statutory rights, and for the purpose of developing the facts with regard to the allegations of broad institutional deficiencies at the facility. The Supreme Court found the circuit court is to implement the standards set forth in *Werner*, *supra*, *W.Va. Code* 49-5-16a (1978), and the regulations promulgated by the West Virginia Department of Human Services pursuant to *W.Va. Code* 49-2B-4 (1981). The Supreme Court found that if the circuit court finds the promulgated regulations do not meet minimum constitutional and statutory requirements, there are minimum guidelines established by the American Correctional Association and the Commission on Accreditation for Corrections for the administration and operation of similar juvenile correctional facilities.

Confinement (continued)

Superintendent's recommendation

State ex rel. G.W.R. v. Scott, 317 S.E.2d 504 (1984) (Per Curiam)

Relator was adjudged a delinquent child and committed to the Davis Center for sixth months to two years. He remained at the Davis Center for approximately seven months and was then placed on probation. Probation was subsequently revoked and relator was committed to Davis for not less than six months not longer than his twentieth birthday. Approximately three months later, the superintendent of the Davis Center informed the respondent judge that relator had successfully completed the program there and should be released from custody since further treatment, even probation, might undermine the progress he had made at the center. Respondent judge found he had ordered the commitment of relator pursuant to the Youthful Offender Act, not under the juvenile statutes and that relator would not be released until after the minimum commitment of six months.

The Supreme Court found the circuit court's jurisdiction over relator was derived from the juvenile statutes and the authority to sentence derived from *W.Va. Code* 49-5-13(b)(5). Applying the principles set forth in syl., *State ex rel. Washington v. Taylor*, 273 S.E.2d 84 (W.Va. 1980), found in Vol. I under this topic, the Supreme Court found the circuit court does not have authority to refuse to receive a juvenile after the director of the institution recommends release. The Court concluded the court's sentencing of relator was based entirely on the juvenile statutes as evidenced by the petition and orders entered in the case prior to his final release from the center. The Supreme Court found the circuit court abused its discretion and exceeded its jurisdiction in ignoring the recommendation of the superintendent of Davis that the relator be released.

Prior to adjudication and disposition

State ex rel. M.C.H. v. Kinder, 317 S.E.2d 150 (1984) (Miller, J.)

Syl. pt. 3 - *W.Va. Code*, 49-5-8(d), and *W.Va. Code*, 49-5A-2, when read in light of the provisions of *W.Va. Code*, 49-1-1(a), demonstrate that the legislature has established a substantial preference for release, rather than custody, at a detention hearing.

Confinement (continued)

Prior to adjudication and disposition (continued)

State ex rel. M.C.H. v. Kinder, (continued)

Syl. pt. 4 - The relevant factors to be considered for preadjudication detention of juveniles, in addition to the statutory provisions found in *W.Va. Code*, 49-5A-2, i.e., "taking into account the welfare of the child as well as the interest of society," are" (1) the seriousness of the offense charged; (2) the likelihood of flight or, conversely stated, the probability of his appearance; (3) his prior juvenile record and regularity of appearances; (4) whether under all of the circumstances, he poses a substantial danger to himself or to the community; (5) his age, maturity, and general health; (6) his family background and the family's willingness to supervise his behavior; and (7) the availability of alternate sources of placement, short of a secure detention facility, if the family is unavailable, unfit, or unwilling to exercise control of the child.

Syl. pt. 5 - Young children should not be placed in secure detention except in the most extraordinary cases. The court found that in determining the minimum age for secure confinement, an analogy can be made to Code 28-1-2(a) (1980) and code 28-3-2- (1980) which prevent post-conviction incarceration of juvenile delinquents under the age of ten for males and twelve for females in facilities operated by the commissioner of corrections.

See JUVENILES Preadjudication detention, Written explanation for detention and bail required, (p. 350) for discussion of topic.

Critical stage

Arbogast v. R.B.C., 301 S.E.2d 827 (1983) (Per Curiam)

The appellant appealed the transfer of his armed robbery case from juvenile jurisdiction to criminal jurisdiction. The appellant alleged the court denied his right to be present when it granted the State's motion to file the petition and set it fro a hearing. The Supreme Court found that although an accused is guaranteed the right to be present at all critical stages of the proceedings, the entry of routine orders filing motions or involving clerical or administrative matters is not such a critical stage. Further, the Court noted that *W.Va. Code* 49-5-7 (1982) providing for service of the petition and sum

JUVENILES

Critical stage (continued)

Arbogast v. R.B.C., (continued)

mons upon the child after the petition has been filed and the preliminary hearing set, clearly contemplates the child's absence at the initial stage of the proceedings. The Supreme Court could not perceive that appellant had been prejudiced in any was by his absence and found that even were they to hold that appellant's presence was necessary, under the facts of this case and error in his exclusion was harmless beyond a reasonable doubt.

Delinquency petition

Sufficiency

Arbogast v. R.B.C., 301 S.E.2d 827 (1983) (Per Curiam)

Appellant appealed the transfer of his armed robbery case from juvenile to criminal jurisdiction. He contended the trial court should have granted his motion to dismiss the petition on the grounds that it did not set forth specific allegations of the conduct and facts upon which it as based, that it was signed by someone without knowledge of or information concerning the facts alleged; and that appellant's mother was not named as a respondent, all in violation of *W.Va. Code* § 49-5-7 (1982). The petition was filed by a probation officer and alleged that a warrant had been issued charging appellant with armed robbery and set out the contents of the warrant had been issued charging the appellant with armed robbery and set out the contents of the warrant in full. The petitioner alleged that, based upon the information contained in the warrant, appellant was a delinquent child. The petition prayed that the appellant's mother be named as respondent and given notice of the hearing. The Supreme Court found the petition to be sufficient under the statute.

JUVENILES

Detention order

Arbogast v. R.B.C.,301 S.E.2d 827 (1983) (Per Curiam)

The appellant, a juvenile, appealed the transfer of his armed robbery case from juvenile jurisdiction to criminal jurisdiction. He maintained the trial court erred in denying his motion to dismiss the petition and proceedings against him on the grounds the detention order did not contain specific find ings of fact; however, the State argued that the proper remedy for defects in the detention order is an application for review of that order under *W.Va. Code* § 49-5A-4 (1972) and not dismissal of the petition. The trial court denied appellant's motion and the Supreme Court found no error in the court's decision.

Detention hearing

Right to

State ex rel. M.C.H. v. Kinder, 317 S.E.2d 150 (1984) (Miller, J.)

See JUVENILES Right to counsel, Detention hearing, (p. 356) for discussion of topic.

Indictment

Arbogast v. R.B.C., 301 S.E.2d 827 (1983) (Per Curiam)

The appellant appealed the transfer of his armed robbery case from juvenile jurisdiction to criminal jurisdiction. On March 30, 1982, a probation officer filed a juvenile petition against appellant. The appellant turned 18 years of age on April 8, and on April 12 the Upshur County grand jury indicted him for the armed robbery. At the time, no transfer hearing had yet been held. The appellant contended the lower court erred in ordering that he be tried under the indictment, because at the time the indictment was returned the court had not yet waived its juvenile jurisdiction over him, and the circuit court was without jurisdiction to seek an indictment.

Indictment (continued)

Arbogast v. R.B.C., (continued)

The Supreme Court found nothing in the juvenile law that would prohibit the State from seeking an indictment against a juvenile against whom transfer proceedings are contemplated. The Supreme Court found that *W.Va. Code* § 49-5-10(b) (1978) merely stays proceedings such as arraignment, until the court had made its decision whether to transfer. The Court agreed that appellant could not have been tried under the indictment, had the court not waived its juvenile jurisdiction, but that the circuit court properly has criminal jurisdiction over him under the facts of this case, any error in seeking the indictment before the court had relinquished its juvenile jurisdic tion was harmless. The court noted were they to hold otherwise, the only remedy to which appellant would be entitled would be an order to squash the indictment, and since the appellant has not yet answered the indictment or otherwise been placed in jeopardy, the state could merely reindict.

Interstate compact on juveniles

In re M.D., 298 S.E.2d 243 (1982) (Harshbarger, J.)

Syl. pt. 1 - A juvenile court must determine whether a runaway child has been requisitioned by another state pursuant to the Interstate Compact on Juveniles, *W.Va. Code*, 49-8-1, *et. seq*., falls within the legislative declaration of persons for whose benefit the Compact exists, that is, "those likely to endanger their own health, morals and welfare, and the health, morals and welfare of others." *W.Va. Code*, 49-8-1.

Syl. pt. 2 - A West Virginia court requested to return a runaway child to a requisition state per the Interstate Compact on Juveniles, *W.Va. Code*, 49-8-1, *et. seq*., should have a hearing and then decide whether it is in the child's best interest to be returned.

JUVENILES

Modification of dispositional order

State v. McDonald, 314 S.E.2d 854 (1984) (Per Curiam)

See JUVENILE Probation revocation, Least restrictive alternative, (p. 351) for discussion of topic.

Mootness of issue

State ex rel. M.C.H. v. Kinder, 317 S.E.2d 150 (1984) (Miller, J.)

See MOOTNESS Capable of repetition, (p. 386) for discussion of topic.

Preadjudication detention

Factors to consider

State ex rel. M.C.H. v. Kinder, 317 S.E.2d 150 (1984) (Miller, J.)

See JUVENILES Confinement, Prior to adjudication and disposition, (p. 345) for discussion of topic.

Written explanation for detention and bail required

State ex rel. M.C.H. v. Kinder, 317 S.E.2d 150 (1984) (Miller, J.)

Syl. pt. 6 - Committing officials have a duty to explain in writing their reasons for detaining a child, their choice of placement, and if they require secured bail, their reasons for doing so. This duty is required by *W.Va. Code*, 49-5A-3 (1978).

The Court found there was an absence of sufficient findings in this case in the magistrate's commitment orders to justify the bail decision. Each order contained only general conclusory language.

JUVENILES

Probation revocation

State ex rel. E.K.C. v. Daughtery, 298 S.E.2d 834 (1982) (Per Curiam)

The nature of the juvenile probationer is no less valuable than that of an adult probationer. A juvenile being subjected to probation revocation must be afforded all the constitutional protections afforded an adult in a probation revocation proceeding. Writ issued.

Least restrictive alternative

State v. McDonald, 314 S.E.2d 854 (1984) (Per Curiam)

The appellant appeals the revocation of his juvenile probation. Appellant was adjudicated a delinquent child on November 7, 1980 and placed on two to five years supervised probation. The probation conditions included a requirement that appellant "not associate with any persons presently on pro bation or who have a previous criminal record." On November 20, 1980, additional terms and conditions were put into effect, including a curfew. In November 1981, the appellant violated his probation by associating with another juvenile on probation. The juvenile probation officer had given appellant permission to associate with the other juvenile as long as it was in one of their homes. On this occasion, the boys were not at home when they were found together. The probation officer's report indicated appellant was probably a good influence on the other boy and that appellant had improved his attitude and personality while on probation. Probation was continued after this incident. The terms were modified slightly on April 29, 1982.

On July 16, 1982, the prosecutor petitioned to modify the dispositional order on the grounds that appellant had violated probation by staying out beyond the curfew with another probationer. On October 21, 1982, the appellant was found guilty of violating two probation conditions by violating curfew and associating with persons on probation or parole. On November 1, 1982, the appellant underwent psychological evaluation to determine his suitability for probation. The psychological problems with immaturity, impulsivity and inadequate self-discipline. The psychologist recommended that probation be continued, suggesting that stronger requirements be imposed. The psychologist did not feel that full time incarceration would be in appellant's best interest.

State v. McDonald, (continued)

Appellant presented his psychological report at the dispositional hearing on November 4, 1982. The Court heard testimony from the probation officer, the appellant's vocational teacher, the appellant and his parents. The probation office testified he was willing to work with the appellant further and he would lean more towards continuing the appellant on probation rather than sending him to a forestry camp or some other secure facility, that the appellant had abided by most of the probation conditions, was ready to take his GED exam, and regularly attended mechanic classes at the vocational school. The vocational instructor testified appellant would probably pass the course with a "C".

The appellant's parents testified that his behavior and relationship with them had greatly improved over the last year or so, and he had done a lot of growing up. They seemed to see appellant's goals to straighten out his life, complete his vocational course, and get a decent job, as something toward which they were all working. They did not think incarceration would help.

The appellant testified he liked vocational school, wanted to complete his GED, and no longer desire to go out with his old friends or get into trouble, he had made new friends, he felt he had improved and could make it on probation, perhaps with a professional to talk to. He said he would try to follow any rules prescribed by the court and would be willing to work with the Sheriff's Department.

Appellant's counsel asked that appellant ne reinstated on probation, suggesting several alternatives. The court rejected probation as ineffective and jail was illegal, felt public service was unworkable and noted that Anthony Center was unavailable since appellant had no criminal conviction. The court remanded appellant to the custody of the Department of Corrections for assignment to a forestry camp for a period of six months to two years. On January 10, 1983, the appellant moved for release from juvenile probation to permit his enlistment in the United States Navy. The court denied the motion.

JUVENILES

Probation revocation (continued)

Least restrictive alternative (continued)

State v. McDonald, (continued)

Appellant contended the court abused its discretion in ordering the jailing of the appellant where the psychological evidence was uncontradicted in stating incarceration would destroy prospects for rehabilitation. He also alleged the court had insufficient reason to revoke his probation and failed to give precedence to the least restrictive dispositional alternative.

The court found that *W.Va. Code* 49-5-14 (1982) sets forth the procedure and standard of proof for modification of juvenile dispositional orders.

Applies standard set forth in syl. pt. 2, *State ex rel. J.R.V. v. MacQueen*, 259 S.E.2d 420 (W.Va. 1979).

The court noted that in *State ex rel. J.R.V. v. MacQueen*, they also held that a juvenile subjected to parole revocation must be afforded all of the constitutional protections afforded an adult in similar proceedings, and noted that the standard of proof in a proceeding under code 49-5-14 (1982) is higher than that used in adult revocation proceedings. The Court found if a substantial violation by the juvenile of the conditions of parole is found by clear and convincing proof, parole may be revoked so long as the minimum requirements of due process are afforded. The Court noted that in *State ex rel. E.K.C. v. Daughtery*, 298 S.E.2d 834 (W.Va. 1982), they extended the due process guarantees of *State ex rel. J.R.V. v. MacQueen*, to juvenile probation proceedings.

The Supreme court found that even where a substantial probation violation is found, neither code 49-5-14 (1982) nor the cases decided thereunder require that probation be revoked. The Court found the court could impose more restrictive probation terms as a penalty.

The Court found the cardinal rule in juvenile dispositional proceedings is that, at the dispositional stage, the court give precedence to the least restrictive of the dispositional alternatives consistent with the best interest and welfare of the public and the child. The Court found that the legislature made it clear that this principle is equally applicable to modification proceedings under Code 49-5-14.

JUVENILES

Probation revocation (continued)

Least restrictive alternative (continued)

State v. McDonald, (continued)

The Court noted that in this case, the order of incarceration contained no specific findings of fact, nor were any designated on the record. The Court gleaned from the transcript the following reasons for the court's ruling; the appellant had twice violated his probation agreement by associating with other probationers; he was nor performing near his potential at vocational school, and there were no definite job prospects in the areas for someone with his vocational training. The Court discounted appellant's more recent progress as merely "good behavior" because of pending probation revocation proceedings and decided the appellant would benefit more from group therapy with his peers at Davis Center than from individual counseling in his community.

The Supreme Court found the record does not support the trial court's conclusion that nothing short of incarceration would benefit the appellant. The Court found the probation violations were not substantial, involved no criminal conduct and seems unlikely to recur given his present attitudes. In contrast, the Court found the appellant had complied with the other terms of his probation agreement and had made significant advances in his education and vocational training, largely through his own initiative. The Court found nothing objectionable about the alternative of the appellant's enlisting in the Navy. The appellant's parents, probation officer and psychologist agreed that incarceration would be of little benefit to the appellant; that his rehabilitation could be better accomplished at home; and that appellant indicated his willingness to comply with any conditions the court might prescribe.

The Court found the trial court erred in refusing to consider the appellant's progress during the interval between probation violation and the dispositional hearing.

The Court found nothing in the record to show the appellant had intentionally failed to conform his actions to law, that he would be dangerous if not incarcerated, or that he would not cooperate with any rehabilitative program absent physical restraint.

JUVENILES

Probation revocation (continued)

Least restrictive alternative (continued)

State v. McDonald, (continued)

The Court held, under these circumstances, the circuit court's decision to revoke the appellant's probation and incarcerate him was arbitrary, constituted an abuse of discretion, was not supported by the evidence, and must be reversed. The Court reversed and remanded for reconsideration of disposition.

Standards

State v. McDonald, 314 S.E.2d 854 (184) (Per Curiam)

See JUVENILE Probation revocation, Least restrictive alternative, (p. 351) for discussion of topic.

Right to counsel

Detention hearing

Arbogast v. R.B.C., 301 S.E.2d 827 (1983) (Per Curiam)

R.B.C. appealed the transfer of his armed robbery case from juvenile jurisdiction to criminal jurisdiction. The appellant was arrested on a warrant charging him with armed robbery. He was immediately taken before the juvenile referee and a detention hearing was held upon the state's motion. Appellant was not represented by counsel at this hearing.

The appellant contended that he had an absolute right to have counsel appointed to represent him at the detention hearing because formal proceedings had begun against him when the warrant was issued and the detention hearing held.

JUVENILES

Right to counsel (continued)

Detention hearing (continued)

Arbogast v. R.B.C., (continued)

The Supreme Court found that although *W.Va. Code* § 49-5-9- 91982) gives juveniles the right to counsel at the preliminary hearing, they found no such guarantee in *W.Va. Code* § 49-5-8 (1982) relating to detention hearings, unless a preliminary hearing is held in conjunction with the detention hearing. Here, the juvenile petition was filed after the detention hearing and counsel was properly appointed at that time. Appellant had the benefit of counsel at the preliminary hearing and there was no denial of his right to counsel.

State ex rel. M.C.H. v. Kinder, 317 S.E.2d 150 (1984) (Miller, J.)

Syl. pt. 2 - Under *W.Va. Code*, 49-5-1(c), when read *in pari material* with *W.Va. Code*, 49-5-2, and *W.Va. Code*, 49-5-8(d), a child who is taken into custody under a warrant must be given a detention hearing and must be given the right to have counsel at the hearing.

The Supreme Court found where a proceeding is initiated by an arrest warrant under Code 49-5-2(c), the detention hearing comes into play.

The Court found to the extent *State ex rel. Kearns v. Fox*, 268 S.E.2d 65 (W.Va. 1980) and *Arbogast v. R.B.C.*, 301 S.E.2d 827 (W.Va. 1983) suggest that the right to counsel is not available for a juvenile at a detention hearing, they are disapproved.

Right to effective assistance

State ex rel. M.S.B. v. LeMaster, 313 S.E.2d 453 (1984) (Neely, J.)

Syl. pt. 1 - Where formal proceedings are instituted against a juvenile under *W.Va. Code* 49-5-1(c) [1982], the juvenile has an absolute right to counsel.

JUVENILES

Right to counsel (continued)

Right to effective assistance (continued)

State ex rel. M.S.B. v. LeMaster, (continued)

Petitioner is a juvenile who will stand trial in Berkeley county. He is charged with two counts of first degree murder and is being held in Princeton, 300 miles form where he is to be tried. He alleges he distance makes it impossible for him to obtain effective assistance of counsel. Petitioner is represented by a lawyer with the Public Defender corporation in Berkeley County.

The Supreme Court noted that public defender offices have heavy caseloads and took judicial notice of the fact that it is at least a six-hour drive from Berkeley county to Princeton and that reasonable air service is not available.

Syl. pt. 2 - Counsel for an indigent defendant should be appointed promptly. Counsel should be afforded a reasonable opportunity to prepare to defend an accused. Counsel must confer with his client without undue delay and as often as necessary, to advise him of his right to elicit matters of defense or to ascertain that potential defenses are unavailable. Counsel must conduct appropriate investigations, both factual and legal, to determine of matters of defense can be developed, and to allow himself enough time for reflection and preparation for trial. An omission or failure to abide by these require ments constitute a denial of effective assistance of counsel unless the state, on which is cast the burden of proof once a violation of these precepts is shown, can establish lack of prejudice thereby.

The Supreme Court was concerned with the problems of placing juveniles and adult offenders in the same penal facilities and found that placing the petitioner, who has not been convicted of any crime in the adult jail in Berkeley County was not a satisfactory alternative.

The Supreme Court found that it was unusual for a claim of ineffective assistance to arise before trial, and they were not comfortable making a definite statement that constitutional rights have been violated when there was no record to support it.

JUVENILES

Right to counsel (continued)

Right to effective assistance (continued)

State ex rel. M.S.B. v. LeMaster, (continued)

In balancing the interests between obtaining the best possible assistance of counsel and the juvenile interest in being placed in a proper facility, the Supreme Court decided that since the petitioner is currently in the custody of the Department of Human Services, it was the department's responsibility to assure that his rights were vindicated. The Supreme Court found that if no facility is available reasonably close to petitioners attorney, the Department of Human Services must pay travel costs so the attorney can meet with petitioners as often as necessary, and the Public Legal Services should provide petitioner with a second lawyer closer to Princeton to assist his current attorney. The Court noted that this was not the perfect solution, but understand the problem to be temporary since an adequate facility will soon be built in Berkeley County.

Transfer

In general

State v. D.D., 310 S.E.2d 858 (1983) (Harshbarger, J.)

The Supreme Court noted that the 1978 legislative amendment to the juvenile transfer provisions reflect a purpose to transfer certain juvenile offenders to what is considered the harsher more punitive world of adult criminal court, eliminate the requirement of the 1977 statute that the transfer offense be "committed, on or after his sixteenth birthday," and make more specific those instances where judicial transfer is permissible.

The Court noted that although the State is no longer expressly required to prove by clear and convincing evidence that there are no reasonable prospects for rehabilitation through resources available to the court, the statutory provisions clearly require the court to consider the child's mental and physical condition, maturity, home or family environment, school experience, and other similar factors for a valid waiver of juvenile jurisdiction.

Transfer (continued)

In general (continued)

State v. D.D., (continued)

The Court also noted that since the 1978 amendment to the transfer statute, the legislature has underscored its continuing commitment to the rehabilitation model of our juvenile law by enacting the W.Va. juvenile offender rehabilitation Act in 1979.

Appeal

State v. Howerton, 329 S.E.2d 874 (1985) (Miller, J.)

Appellant was convicted of committing second degree murder when he was seventeen. He was transferred from juvenile to adult criminal jurisdiction upon a finding that probable cause existed to believe he had committed a murder. Although the appellant did not exercise his right to a direct statutory appeal from the transfer order, he challenges the validity of his transfer on the ground the trial court failed to make adequate findings of fact and conclusions of law, and on other grounds.

Syl. pt. 1 - A juvenile defendant's failure to comply with *W.Va. Code*, 49-5-10(f), relating to a direct appeal of a transfer to the criminal jurisdiction of the circuit court, forecloses our considering his objection as to the transfer hearing on his subsequent criminal appeal.

In footnote 2, the Court noted the evidence adduced at the transfer hearing was clearly sufficient to support the trial court's finding of probable cause.

Burden of proof

State v. Largent, 304 S.E.2d 868 (1983) (Per Curiam)

See JUVENILE Transfer, Factors considered, (p. 361) for discussion of topic.

JUVENILE

Transfer (continued)

Delay in transfer

Arbogast v. R.B.C., 301 S.E.2d 827 (1983) (Per Curiam)

The appellant, a juvenile, appealed the transfer of his armed robbery case from juvenile jurisdiction to criminal jurisdiction. He contended the circuit court should have granted his motion to dismiss transfer proceedings because his transfer hearing was not held within seven days of the filing of the motion for transfer pursuant to *W.Va. Code* § 49-5-10 (1978), and no continuance for good cause was shown on the record. The Supreme court did not agree.

Upon the filing of the transfer motion on April 13, the trial court set the matter for hearing on April 26. The appellant objected to this delay and on April 27 filed his motion to dismiss the proceedings. The motion was heard and denied. The Supreme Court found no orders of record indicating good cause for the initial delay in setting the hearing, but noted that the transcript of the hearing on the motion revealed that the transfer hearing was set on the first available court date and that the judge was out of town during the previous week. The Supreme Court also noted appellant's counsel should have had only four days, after service of the notice, to prepare if the hearing had been held within seven days and that the appellant filed his discovery motions on April 12 and had not yet received the State's response when the parties first appeared before the court on April 27. At that time counsel indicated he would not be prepared to conduct the transfer hearing should his motion be denied, unless he had been provided with answers to his discovery motions. The State provided those answers on April 29 and the Court continued the hearing until May 3.

The Supreme Court also noted the only prejudice alleged was that appellant was forced to remain in jail awaiting the Court's determination, whether he would be treated as a juvenile or an adult. The Supreme Court noted that the appellant had been incarcerated since his arrest and was unable to post bond even after the court reduced it, and that the appellant remained in jail during appeal. Under these circumstances the Supreme Court failed to see how an earlier transfer hearing would have changed appellant's situation to any degree.

JUVENILE

Transfer (continued)

Delay in transfer (continued)

Arbogast v. R.B.C., (continued)

The Supreme court found good cause was shown for each continuance of the case, especially in light of the numerous motions and discovery requests, disposition of which was necessary before the transfer could proceed. The Court concluded appellant was not prejudiced by any delay.

Factors considered

***State v. Largent*,** 304 S.E.2d 868 (1983) (Per Curiam)

Applies standard set forth in syl., *In the Interest of Clark*, 285 S.E.2d 369 (W.Va. 1981). (Found in main text under this topic.)

At a transfer hearing under *W.Va. Code* 49-5-10 (1978), the State has the burden of establishing probable cause that the child has committed one of the enumerated offense. *In re E.H.*, 276 S.E.2d 557 (W.Va. 1981). In each case, the judge must make a finding by a juvenile referee, magistrate, of grand jury.

Mere conclusory statements by witnesses, without going into the circumstances of the crime which would link the juvenile to its commission, cannot be the basis of a finding of probable cause based entirely by the court. Neither may the probable cause determination be based entirely upon hearsay evidence. Rather, "[t]rial judge himself must make an independent determination upon substantive facts that probable cause exists." *Clark*.

Here, the appellant was charged with petition with first-degree arson, two counts of third-degree arson, nighttime burglary and petit larceny. A juvenile referee found probable cause.

At the transfer hearing, the State presented two witnesses. The arresting officer testified that he investigated the arson of a dwelling house and as a result of his investigation arrested the appellant. An owner of the house testified that she supported the officer in his recommendation that the matter be transferred to adult jurisdiction. She had no personal knowledge of appellant's reputation or conduct in the community.

***State v. Largent*,** (continued)

The Supreme court found the State completely failed to meet its burden of proof and that the State introduced no evidence that would support a finding of probable cause by the court, nor was there any such finding by the court, either on the record or in the transfer order. The judgement was reversed and the case remanded for a proper transfer hearing.

State v. D.D., 310 S.E.2d 858 (1983) (Harshbarger, J.)

The appellant was transferred from juvenile to adult jurisdiction. The appeal raises the issue, can a child who commits two acts that would be felony offenses if committed by an adult, be transferred for adult criminal proceedings pursuant to Code 49-5-10 (d) (5) [1978], if at the time the acts were committed, the child had never been adjudged a delinquent?

The appellant, sixteen at the time, allegedly committed two crimes during one night that would be felonies if committed by an adult, breaking and entering and receiving or transferring a stolen vehicle. A delinquency petition was filed charging that he had received or transferred the stolen vehicle, the second offense committed that night. He plead guilty and was adjudged delinquent. Before his disposition he was indicted for the b & e and his case was transferred to the trial court's juvenile jurisdiction. The prosecution then moved to transfer him back to the adult side pursuant to Code 49-5-10 (d) (5), stating there was probable cause to believe he had committed a b & e and that he had been previously found guilty for receiving stole property, also a felony if committed by an adult. The circuit court granted the transfer motion.

Syl. pt. 1 - When the juvenile transfer statute is interpreted according to the well-established principle that transfer should be the exception and not the rule, *see*, *e.g.*, *State ex rel. Smith v. Scott*, 238 S.E.2d 223 (W.Va. 1977), ambiguous statutory language should be construed against transfer.

Transfer (continued)

Factors to be considered (continued)

State v. D.D., (continued)

Syl. pt. 2 - *W.Va. Code*, 49-5-10(d) (5) [1978], provides that a court may transfer a juvenile to its criminal jurisdiction when the child, sixteen years of age or over, has committed an offense that would be a felony if committed by an adult, if the child has been previously adjudged delinquent for an offense which would be a felony if the child were an adult. This part of Code, 49-5-10(d) was not intended to be a vehicle for transfer to adult status unless the juvenile has previously been adjudged delinquent for a felony (though juvenile) offense that was committed before the felony presently being charged.

The Supreme Court found the legislature never intended subsection (d) (5) to permit waiver of juvenile jurisdiction in the circumstances of this case. Here, the appellant had never been adjudged delinquent at the time he allegedly committed the offense relied on for transfer. The Court found the juvenile court with all its resources never had a chance to help him.

The Supreme Court thought the statute contemplates that there be probable cause to believe that the child *committed* the felony-type offense relied on for transfer, after having been adjudged delinquent for a felony-type offense. The Court found the statute is directed at individuals who, subsequent to a juvenile adjudication, manifest a lack of amenability to juvenile court rehabilitation processes by committing another offense.

The Court held that D.D. was not subject to transfer and must remain in the juvenile jurisdiction of the circuit court.

Inadmissible confession

State v. Harman, 329 S.E.2d 98 (1985) (Per Curiam)

Appellant appeals his transfer from juvenile to adult jurisdiction. Appellant was charged with breaking and entering. At a transfer hearing the appellant denied making any incriminating statements to the trooper, and testified that

JUVENILE

Transfer (continued)

Inadmissible confession (continued)

State v. Harman, (continued)

he asked for an attorney approximately six times during the course of the questioning. When the trooper asked him if he had had *Miranda* rights read to him previously, he answered in the affirmative. The defendant also testified that the trooper told him the court would be more lenient with him if he admitted committing the crime but if he didn't confess, the court was going to "crack down on [him]." The circuit court granted the motion to transfer the case to criminal jurisdiction and subsequently granted a defense motion to suppress, at the upcoming trial, the oral statement made by the appellant to the trooper. The defendant thereafter moved to reconsider the transfer on the basis of newly-discovered evidence, i.e., defense counsel had received information that the defendant had made statements regarding the crime to the prosecuting attorney in a telephone conversation while he was in florida awaiting extradition and without an attorney present. In his motion the defendant asserted that the statement to the prosecutor formed the basis for and tainted the later statement made to the trooper. The trial court refused to modify its prior ruling on transfer.

The Court found the juvenile defendant in this case was twice told, once by the prosecuting attorney and once by the trooper, that he would be treated leniently if he cooperated and would be incarcerated if he did not. The prosecutor intimated he would keep him out of jail if he would tell the authorities where to find the money taken in the breaking and entering. The defendant made statements in both instances without the benefit of his attorney being present even though during his interrogation by the trooper, he requested an attorney approximately six times.

The Court found both the prosecuting attorney and the state trooper in this case made representations to the juvenile defendant that were clearly for the purpose of fomenting hope that he could escape punishment for his actions if he confessed. Under these circumstances, the court was of the opinion the trial court erred in admitting the defendant's statement at his transfer hearing. The Court found without the statement, the evidence failed to show probable cause that the defendant committed the crime. The Court was of the opinion the circuit court erred in denying the defendant's motion to reconsider the transfer. Reversed and remanded.

JUVENILE

Transfer (continued)

Probable cause

State v. Largent, 304 S.E.2d 868 (1983) (Per Curiam)

See JUVENILE Transfer, Factors considered, (p. 361) for discussion of topic.

Transfer from juvenile facility to adult penal institution

State v. Highland, 327 S.E.2d 703 (1985) (McGraw, J.)

Syl. pt. 2 - Under West Virginia Code § 49-5-16 (b) (Supp. 1984), the legislature has provided that a juvenile convicted and sentenced in adult court may be transferred after reaching the age of eighteen from a juvenile facility to an adult penal institution only if the Commissioner of the Department of Corrections and the court which committed the juvenile agree that such transfer is appropriate. Without the assent of both, no transfer is authorized under the statute.

Syl. pt. 3 - Under West Virginia Code § 49-5-16 (b) (Supp. 1984), a pre-transfer modification hearing is required only when a transfer is imminent, that is, only when both the sentencing court and the Commissioner of corrections have determined that transfer to an adult institution is appropriate.

LARCENY

Double jeopardy

State v. Hall, 298 S.E.2d 246 (1982) (McHugh, J.)

See RECEIVING STOLEN GOODS Sufficiency of evidence, (p. 440) for discussion of topic.

State v. Oldaker, 304 S.E.2d 843 (1983) (Harshbarger, J.)

See RECEIVING STOLEN GOODS Elements of the offense, (p. 440) for discussion of topic.

Elements

In general

State v. Neider, 295 S.E.2d 902 (1982) (Miller, C.J.)

See ROBBERY Elements, In general, (p. 452) for discussion of topic.

Applies standard set forth in syl. pt. 3, *State v. Louk*, 285 S.E.2d 432 (W.Va. 1981). (Found in Vol. I under this topic.)

Common law larceny

State v. Houdeyshell, 329 S.E.2d 53 (1985) (Per Curiam)

See LARCENY Sufficiency of the evidence, Lawful possession of the property, (p. 368) for discussion of topic.

Lawful possession of the property

State v. Houdeyshell, 329 S.E.2d 53 (1985) (Per Curiam)

See LARCENY Sufficiency of the evidence, Lawful possession of the property, (p. 368) for discussion of topic.

LARCENY

Elements (continued)

Proof of embezzlement

State v. Houdeyshell, 329 S.E.2d 53 (1985) (Per Curiam)

See LARCENY Sufficiency of evidence, Lawful possession of the property, (p. 368) for discussion of topic.

Statutory offenses

State v. Houdeyshell, 329 S.E.2d 53 (1985) (Per Curiam)

See LARCENY Sufficiency of evidence, Lawful possession of the property, (p. 368) for discussion of topic.

Instructions

Intent

State v. Watson, 318 S.E.2d 603 (1984) (Miller, J.)

See INSTRUCTIONS Burden shifting, (p. 296) for discussion of topic.

Sufficiency of evidence

State v. Hall, 298 S.E.2d 246 (1982) (McHugh, J.)

See RECEIVING STOLEN GOODS Sufficiency of evidence, (p. 440) for discussion of topic.

Embezzlement

State v. Houdeyshell, 329 S.E.2d 53 (1985) (Per Curiam)

See LARCENY Sufficiency of the evidence, Lawful possession of the property, (p. 368) for discussion of topic.

Sufficiency of evidence (continued)

Lawful possession of the property

State v. Houdeyshell, 329 S.E.2d 53 (1985) (Per Curiam)

Appellant was convicted of grand larceny. He was indicted for the theft of truck tires, metal chains and metal binders. The equipment was allegedly stolen trailers the defendant had leased from TTS, Inc. At trial, the State introduced the testimony of the owner of TTS, Robert Frazier. Frazier testified he rented three flat-bed trailers to the appellant. The trailers had chains and binders with them and each trailer had at least eight tires. Subsequently, when an agreement on rent was not reached, Frazier sent his employees to get the trailers. They found one of the trailers sitting flat on the ground with all its tires gone, a second trailer with some of the tires gone, and the third with some of the original tires and some worn flat tires. He testified that his employees found several tires belonging to his company in the back of a pickup truck; that they found four TTS tires on an unidentified trailer; and that the defendant agreed to, but never did, return the remained of the tries that Mr. Frazier and his employees could not locate.

Two former employees of the defendant were also called by the state to testify. Basically, their testimony was that tires were sometimes taken from the TTS trailers and placed on other equipment used in the defendant's business; that there were many flat tires in the course of their employment because of the nature of the defendant's business; and that the defendant at times bought tires to replace the ones that went flat or blew out. A state trooper testified he saw at least one TTS tire in the back of a pickup truck that belonged to the defendant; that he observed one trailer on the ground without any tires on it; and, that he was present during a telephone conversation between the defendant and Mr. Frazier in which there appeared to be a dispute over the ownership of certain tires.

The defense showed the defendant had purchased between ten and fifty tires to replace ones that had blown out or gone flat. Former employees of the defendant testified they knew that there were a great many blown out tires; the defendant bought tires to replace the bad ones; that it was not unusual to switch tires from one vehicle to another; and that this usually occurred when one piece of equipment was not working and its tires would be removed to be used on another piece of equipment until the first was repaired. The

LARCENY

Sufficiency of evidence (continued)

Lawful possession of the property (continued)

State v. Houdeyshell, (continued)

defendant denied stealing tires and testified he replaced most of the blown out or flat TTS tires with ones he purchased. The defendant further testified the only TTS chains and binders in his possession were rented by one of his employees without his knowledge for a one-day period before they were returned. Finally the defendant testified that a disagreement arose between himself and Frazier over the rent on the trailers. The men agreed the trailers would be returned, the defendant would keep the good tires he had purchased, and pay a full month's rental instead of half a month as he had originally proposed.

Syl. pt. 1 - "To support a conviction for larceny at common law, it must be shown that the defendant took and carried away the personal property of another against his will and with the intent to permanently deprive him of the ownership thereof." Syllabus Point 3, *State v. Louk*, 285 S.E.2d 432 (W.Va. 1981).

The defendant asserts that because he lawfully came into possession of the property which is the subject of his conviction, he cannot be guilty of larceny under this definition.

The Court noted they held in *State v. Robinson*, 145 S.E. 383 (W.Va. 1928) that:

> And, where property comes into possession of the taker lawfully with consent of the owner, expresses or implied, as where the taker is allowed to have possession of the chattel under contract or hiring, loan, or other bailment, or in the assertion of an honest claim of right, a conversion of the chattel by him while so in possession of it, pursuant to a felonious intent formed subsequent to its acquisition, is not larceny. 106 W.Va. at 279 1145 S.E.2d at 384.

The court found, to the contrary, if the bailee has the intent to steal at the very moment he receives possession of the property, then he can be guilty of larceny.

LARCENY

Sufficiency of evidence (continued)

Lawful possession of the property (continued)

State v. Houdeyshell, (continued)

The Court found, in this case, there was no evidence and the State did not attempt to prove that the defendant had the requisite felonious intent to steal the property of TTS when he entered into the rental agreement and obtained possession of it. The Court found the evidence was to the contrary since the defendant paid monthly rentals on the trailers for some time and used then in his salvage business as he had represented he would do. The Court concluded the evidence was sufficient to support a common law larceny conviction.

The Court found that in *State v. Louk*, 285 S.E.2d 432 (W.Va. 1981) they recognized that, in addition to common law larceny, we have certain statutes dealing with specialized forms of theft and that certain offenses that were not crimes at common law have been designated as larceny under these various statutes. The Court found in *State v. Moyer*, 52 S.E. 30 (W.Va. 1905) the stated that embezzlement, which is designated in *W.Va. Code* 61-3-20 (1929) as a form of larceny, is purely a statutory offense.

The Court noted it is well established law that one under indictment for common law larceny ma be convicted of that offense by evidence showing that he embezzled the property alleged to have been stolen. *State v. West*, 157 W.Va. 209, 200 S.E.2d 859 (1973).

The Court found the defendant's contention, therefore, that he could not have been convicted of larceny because he came into possession of the property lawfully must fail. If the elements of the crime were proved he could have been convicted of a statutory form of larceny even though he was indicted for the common law offense.

The Court found although a common law larceny indictment will support an embezzlement conviction, if the State proves the elements of embezzlement, it is a basis tenet of law that the jury must be instructed on those elements before a conviction can be sustained by proof of them. The Court found a jury cannot convict one of a crime whose elements are unknown to the jury.

LARCENY

Sufficiency of evidence (continued)

Lawful possession of the property (continued)

State v. Houdeyshell, (continued)

The Court found the record in this case indicates the jury was instructed only on common law grand larceny, therefore the defendant cannot be convicted of grand larceny by embezzlement.

The court found the State's failure to prove an essential element of the offense of grand larceny is a manifest inadequacy in the evidence, the motion for acquittal should have been granted, and the judgement of the trial court is reversed and the defendant unconditionally discharged from custody.

Value of stolen property

State v. Hall, 298 S.E.2d 246 (1982) (McHugh, J.)

See EVIDENCE Value of stolen property, (p. 197) for discussion of topic.

LEAVING THE SCENE OF AN ACCIDENT

Elements of the offense

State v. Tennant, 319 S.E.2d 395 (1984) (Miller, J.)

The appellant was convicted of leaving the scene of an accident in violation of *W.Va. Code* 17C-4-1. On appeal he contends that before a conviction can be obtained under this statute, the jury must be instructed that the defendant must have had knowledge of the accident and the resulting injury to be guilty of the offense. The Supreme Court reversed the conviction on other grounds, but addressed this issue, for purpose of retrial, even though it appeared to not be properly preserved.

Syl. pt. 3 - *W.Va. Code*, 17C-4-1, must be read to require the State to prove that the driver charged with leaving the scene of an accident knew of the accident and the resulting injury or reasonably should have known of the injury from the nature of the accident.

The Court found any contrary indication found in *State v. Masters*, 106 W.Va. 46, 144 S.E. 718 (1928) to be holding in syl. pt. 3 of this case is hereby expressly overruled.

Instructions

State v. Tennant, 319 S.E.2d 395 (1984) (Miller, J.)

See LEAVING THE SCENE OF AN ACCIDENT Elements of the offense, (p. 372) for discussion of topic.

Sufficiency of the evidence

State v. Tennant, 319 S.E.2d 395 (1984) (Miller, J.)

The appellant was convicted of leaving the scene of an accident in violation of *W.Va. Code* 17C-4-1. He contends there was insufficient evidence to support the verdict and particularly points to the State's failure to prove that under *W.Va. Code* 17C-4-3, he failed to offer reasonable assistance.

LEAVING THE SCENE OF AN ACCIDENT

Sufficiency of the evidence (continued)

State v. Tennant, (continued)

The Supreme Court found the issues of whether or not the defendant knew or should have known that the accident was such that it might reasonably be expected that one or more of his passengers was either injured or dead, and whether or not the defendant remained at the scene of the accident and rendered reasonable assistance, were questions for the jury. The Court declined to hold that as a matter of law there was insufficient evidence regarding whether or not the defendant rendered reasonable assistance.

LESSER INCLUDED OFFENSE

In general

State v. Neider, 295 S.E.2d 902 (1982) (Miller, C.J.)

The question whether a defendant is entitled to an instruction on a lesser included offense involves a two-part inquiry. The first is a legal one having to do with whether the lesser offense is by virtue of its legal elements or definition included in the greater offense. In this regard, the Supreme Court applied the standard set forth in syl. pt. 1, *State v. Louk*, 285 S.E.2d 432 (W.Va. 1981). (Found in Vol. I under this topic.)

The second inquiry is a factual one which involves a determination by the trial court if there is evidence which would tend to prove such lesser included offense.

Syl. pt. 2 - Where there is no evidentiary dispute or insufficiency on the elements of the greater offense which are different from the elements of the lesser included offense, then the defendant is not entitled to a lesser included offense instruction.

State v. Ruddle, 295 S.E.2d 909 (1982) (Per Curiam)

Applies standard set forth in syl. pt. 2, *State v. Neider*, 295 S.E.2d 902 (W.Va. 1982), cited above.

State v. Wyer, 320 S.E.2d 92 (1984) (Miller, J.)

Applies standard set forth in syl. pt. 1, *State v. Louk*, 285 S.E.2d 432 (W.Va. 1982), (Found in Vol. I under this topic.)

Applies standard set forth in syl. pt. 2, *State v. Neider*, 295 S.E.2d 902 (W.Va. 1982) found above.

State v. Cabalceta, 324 S.E.2d 383 (1984) (Per Curiam)

See CONTROLLED SUBSTANCES Manufacturing, Lesser included offense, (p. 80) for discussion of topic.

LESSER INCLUDED OFFENSE

Arson

State v. Jones, 329 S.E.2d 65 (1985) (McHugh, J.)

See ARSON Lesser included offense, (p. 38) for discussion of topic.

Controlled substances

Manufacturing/possession

State v. Cabalceta, 324 S.E.2d 383 (1984) (Per Curiam)

See CONTROLLED SUBSTANCES Manufacturing, Lesser included offense, (p. 80) for discussion of topic.

Standard for determining

State v. Jones, 329 S.E.2d 65 (1985) (McHugh, J.)

Syl. pt. 1 - The question of whether or not a defendant is entitled to an instruction on a lesser included offense involves a two-part inquiry. The first inquiry is a legal one having to do with whether the lesser offense is by virtue of its legal elements or definition included in the greater offense. The second inquiry is a factual one which involves a determination by the trial court of whether there is evidence which would tend to prove such lesser included offense. *State v. Neider*, 295 S.E.2d 902 (W.Va. 1982).

MAGISTRATE COURT

Jurisdiction

State ex rel. Adkins v. Hosey, 310 S.E.2d 206 (1983) (Per Curiam)

See PATERNITY Statute of limitations, (p. 396) for discussion of topic.

Right to trial

Cline v. Murensky, 322 S.E.2d 702 (1984) (McHugh, J.)

An altercation took place at a nightclub owned by the petitioners. The petitioners entered pleas of guilty at 4 a.m. in magistrate court to brandishing a weapon. The prosecutor was not present at the hearing. The petitioners were later indicted by misdemeanor indictments for carrying a weapon without a license. The parties in this proceeding agree that the charges of brandishing a weapon and carrying a weapon without a license arose from the same criminal transaction. The petitioners contended they were told by the magistrate that if they plead guilty to brandishing, the charge of carrying a weapon without a license would be dropped. The petitioners allege if prosecution for carrying a weapon without a license is not prohibited, they have a right to trial upon such charges in magistrate court.

The Supreme court found the arrest warrants, although inartfully drafted and not condoned by the Court, substantially followed the language of the brandishing statute, *W.Va. Code*, 61-7-10, and that the word "brandishing" appeared at the top of each arrest warrant. The Court found the petitioners were never, in fact, charged in magistrate court with the offense of carrying a weapon without a license and that they had no right to trial in magistrate court upon such charges.

Speedy trial

State ex rel. Stiltner v. Harshbarger, 296 S.E.2d 861 (1982) (Neely, J.)

See SPEEDY TRIAL Magistrate court, (p. 554) for discussion of topic.

MANDAMUS

In general

McMellon v. Adkins, 300 S.E.2d 116 (1983) (Neely, J.)

"A writ of mandamus will not issue unless three elements co-exist - (1) a clear legal right in the petitioner to the relief sought; (2) a legal duty on the part of the respondent to do the thing which the petitioner seeks to compel; and (3) the absence of another adequate remedy." Syllabus point 2, *State ex rel. Kucera v. City of Wheeling*, 153 W.Va. 538, 170 S.E.2d 367 (1969).

Appellate review

State ex rel. Ash v. Randall, 301 S.E.2d 832 (1983) (McHugh, J.)

"The judgement in a circuit court in a proceeding in mandamus based upon a finding of fact upon conflicting testimony will not be reversed unless it appears to be clearly wrong." Syllabus point 1, *Point Pleasant Register Publishing Company v. County Court of Mason County*, 115 W.Va. 708, 177 S.E. 873 (1934).

Duty to issue rule to show cause

State v. Gainer, 318 S.E.2d 456 (1984) (McGraw, J.)

Syl. pt. - Under West Virginia Code § 53-1-5 (1981) (Replacement Vol.), circuit courts have a mandatory duty to issue a rule to show cause in mandamus or prohibition actions unless the petition seeking such extraordinary relief fails to make a prima facie case.

Duty of prosecutor to indict

State ex rel. Hamstead v. Dostert, 313 S.E.2d 409 (1984) (McGraw, J.)

See GRAND JURY Prosecutors role, (p. 204) for discussion of topic.

MANDAMUS

Standing

Prison conditions

Hickson v. Kellison, 296 S.E.2d 855 (1982) (Miller, C.J.)

Applies standard set forth in syl. pt. 1, *State ex rel. Pingley v. Coiner*, 155 W.Va. 591, 186 S.E.2d 220 (1972). See *State ex rel. K.W. v. Werner*, 242 S.E.2d 907 (1978) (Found in Vol. I under PRISON CONDITIONS Cruel and unusual punishment, Remedy.

Myers v. Frazier, 319 S.E.2d 782 (1984) (Miller, J.)

See PLEA BARGAINING In general, (p. 398) for discussion of topic.

MENTAL HYGIENE

In general

State v. Simmons, 309 S.E.2d 89 (1983) (Miller, J.)

See INSANITY Confidentiality of medical records, (p. 284); INSANITY Physician - patient privilege, (p. 287) for discussion of topic.

Inebriated persons

State ex rel. Harper v. Zegeer, (addendum on rehearing) 296 S.E.2d 873 (1982) (Harshbarger, J.)

See PUBLIC INTOXICATION Incarceration of alcoholics, (p. 431) for discussion of topic.

MISTRIAL

In general

State v. Williams, 305 S.E.2d 251 (1983) (McGraw, J.)

See MISTRIAL Prejudicial publicity, (p. 382) for discussion of topic.

Evidence of collateral crime

State v. Cabalceta, 324 S.E.2d 383 (1984) (Per Curiam)

See EVIDENCE Collateral crimes, (p. 160) for discussion of topic.

Jury deliberations

State v. Ray, 298 S.E.2d 921 (1982) (Miller, C.J.)

See SEXUAL ASSAULT Jury deliberations, (p. 550) for discussion of topic.

Mid-trial discharge at behest of prosecution

Manifest necessity

Porter v. Ferguson, 324 S.E.2d 397 (1984) (Harshbarger, J.)

Petitioners trail for first degree murder commenced January 17, 1984. The State successfully moved in limine to prevent inquiry into a previous arrest of a key prosecution witness on charges unrelated to those against Porter. During cross-examination, defense counsel asked about arrest. The trial court sustained the prosecutions objection to this question and admonished defense counsel to comply with its rulings or face contempt charges. Cross examination resumed and defense counsel began questioning the witness about interviews she had given police. The witness volunteered that she had been arrested and defense counsel asked "What for?" The court intervened, refused to allow the witness to answer the question and granted the prosecution's motion for a mistrial.

MISTRIAL

Mid-trial discharge at behest of prosecution (continued)

Manifest necessity (continued)

Porter v. Ferguson, (continued)

Petitioner seeks to prohibit another trial on the count because there was no manifest necessity for the declaration of a mistrial, and would be placed in double jeopardy.

Syl. pt. 1 - Midtrial discharge of a jury at the behest of the prosecution and over the objection of a defendant is generally not favored.

Syl. pt. 2 - Unless the occasion for mistrial is a manifest necessity beyond the control of the prosecutor or judge, the prosecution should not be permitted to move for and obtain a mistrial.

Syl. pt. 3 - The determination of whether "manifest necessity" that will justify ordering a mistrial over a defendant's objection exists is a matter within the discretion of the trial court, to be exercised according to the particular circumstances of each case.

Syl. pt. 4 - Improper conduct of defense counsel which prejudices the state's case may give rise to manifest necessity to order a mistrial over the defendant's objection.

Here, the Supreme court could not say the trial court abused its discretion in granting the State's motion for a mistrial. The Court found the record reveals that petitioner's lawyer tried to impeach a key prosecution witness by asking her if she had ever been arrested for anything. The Court found the inquiry was not only improper, but was also in direct violation of the limine ruling. Defense counsel was admonished, not once, but twice, against inquiring into the witness' prior arrests, and threatened with contempt if he did so. The Court found he then embarked upon a line of questioning that elicited the desired response.

MISTRIAL

Mid-trial discharge at behest of prosecution (continued)

Manifest necessity (continued)

Porter v. Ferguson, (continued)

The Court found it was clear the court did not act precipitately; both incidents resulted in lengthy discussions at the bench about the conduct of counsel and the double jeopardy ramifications of ordering a mistrial. The jury was not discharged until it became apparent that defense counsel did not intend to abide by the court's order. The Court found, in these circumstances, they must defer to the trial court's findings of manifest necessity, and they found no bar to the petitioner's retrial.

Prejudicial publicity

State v. Williams, 305 S.E.2d 251 (1983) (McGraw, C.J.)

Appellant was convicted of murder, arson and robbery. On appeal he alleged the trial court abused its discretion in refusing to grant his motion for a mistrial on the ground that publicity prejudicial to the appellant was disseminated in the course of the trial. An article appeared in the *Welch Daily News* the first day of trial. The article recounted the details of the co-defendant's statement to the police and comments attributed to the prosecutor made during the co-defendant's trial and implicating the appellant. Defense counsel's motion for a mistrial was denied.

After the verdict, counsel for the appellant raised the issue again in his motion for a new trial. In support of the motion, counsel introduced into evidence two affidavits, given by brothers of the appellant, which stated that a juror had been seen carrying a copy of the *Welch Daily News* into the jury room when he arrived on the morning of the second day of trial. The motion was denied.

Prejudicial publicity (continued)

State v. Williams, (continued)

The decision to declare a mistrial, discharge the jury and order a new trial in a criminal case is a matter within the sound discretion of the trial court. *State v. Craft*, 131 W.Va. 195, 47 S.E.2d 681 (1948). A trial court is empowered to exercise this discretion only when there is a "manifest necessity" for discharging the jury before it has rendered its verdict. *W.Va. Code* § 62-3-7 (1977 Replacement Vol.). This power of the trial court must be exercised wisely; absent the existence of manifest necessity, a trial court's discharge of the jury without rendering a verdict had the effect of an acquittal of the accused and gives rise to a plea of double jeopardy. See *State ex rel. Brooks v. Worrel*, 156 W.Va. 8, 190 S.E.2d 474 (1972); *State ex rel. Dandy v. Thompson*, 148 W.Va. 263, 134 S.E.2d 730 *cert. denied*, 379 U.S. 819, 85 S.Ct. 39, 13 L.Ed.2d 30 (1964); *State v. Little*, 120 W.Va. 213, 197 S.E. 626 (1938).

"It is improper for the jurors to read any newspaper articles discussing a case on trial. If the articles read are likely to mislead or improperly affect their minds, the impropriety may constitute reversible error." Syllabus 1, *State v. Barille*, 111 W.Va. 567, 163 S.E. 49 (1932). Syl. pt. 1, *State v. Williams*, 230 S.E.2d 742 (W.Va. 1976). The principle underlying this statement is that the jury's information about a case should come from the evidence properly presented at trial and not from any extraneous source. See *Thompson v. Com*, 219 Va. 498, 247 S.E.2d 707 (1978). In *Williams*, *supra*, it was held that where the court finds that "a substantial likelihood exists that the verdict was influenced by the juror's exposure to newspaper articles disseminated during the course of a criminal trial and there is a substantial likelihood that the information contained in such articles will influence the jury to the prejudice of the defendant, a "manifest necessity" may exist which would justify the trial court in declaring a mistrial and ordering a new trial.

Footnote 3 - Declaring a mistrial may not be necessary in all circumstances. Other corrective measures, such as cautionary instructions or excusing individual jurors, may be more appropriate, depending upon the facts and circumstances of each case.

Prejudicial publicity (continued)

State v. Williams, (continued)

Syl. pt. 4 - A defendant who seeks a mistrial on the ground that the jury has been improperly influenced by prejudicial publicity disseminated during trial must make some showing to the trial court at the time the motion is tendered that the jurors have in fact been exposed to such publicity.

Syl. pt. 5 - If it is determined that publicity disseminated by the media during trial raised serious questions of possible prejudice, the court may on its own motion or shall on motion of either party question each juror, out of the presence of the others, about his exposure to that material.

Syl. pt. 6 - Where a defendant in a criminal trial declines the opportunity to poll the jurors as to their exposure to possibly prejudicial publicity disseminated during trial, such error is waived and may not be raised after the return of the verdict in a motion for a new trial, unless the defendant produces evidence that shows that some member of the jury was improperly influenced by such publicity.

The Court found that since the appellant in this case expressly declined to poll the jurors on the question of their exposure to the objectionable newspaper account, and produced no evidence after trial to indicate that the jury was improperly influenced thereby, they found no error in the denial of the motion for a mistrial.

State v. Schofield, 331 S.E.2d 829 (1985) (Neely, C.J.)

Appellant's counsel requested a mistrial because of two photographs that appeared in the newspapers. One showed appellant testifying at the in-camera voluntariness hearing with an empty jury box in the photo. The other showed her being escorted to the courthouse by a deputy sheriff.

MISTRIAL

Prejudicial publicity (continued)

State v. Schofield, (continued)

The trial court and defense counsel questioned the jurors individually regarding the exposure to the photos. It appeared that most of the jurors had seen one or both of the photos and that one of the newspapers appeared in the jury room that day before. Apparently none of the jurors had seen it. Each juror indicated that he was not biased, prejudiced, or influenced in any way, by this exposure to the photos.

Syl. pt. 5 - Whether to grant a mistrial because of allegedly prejudicial photographs depicting the trial that appeared in local newspapers is within the sound discretion of the trial court.

The trial court made a finding of fact that the jurors could follow his instructions and would base their decision solely on the evidence. The Court found the *voir dire* demonstrated to his satisfaction that none of the jurors drew any inferences or conclusions adverse to the defendant from the photographs. The Court found no abuse of discretion.

Prosecutor's comments

State v. Sparks, 298 S.E.2d 857 (1982) (Per Curiam)

See DENIAL OF A FAIR TRIAL Prosecutor's comments/conduct, (p. 96) for discussion of topic.

MOOTNESS

Capable of repetition

State ex rel. M.C.H. v. Kinder, 317 S.E.2d 150 (1984) (Miller, J.)

In this case two juveniles were confined in a secure detention facility to await the disposition of delinquency proceedings. The relators argue they should not have been confined in such a facility because of their ages and that their release should not have been conditioned on the posting of a $5,000 bond for each child. At the time of the hearing on the petition for habeas corpus in the Supreme Court, the relator had been released into the custody of their mother.

Syl. pt. 1 - A case is not renders moot even though a party to the litigation has had a change in status such that he no longer has a legally cognizable interest in the litigation or the issues have lost their adversarial vitality, if such issues are capable of repetition and yet will evade review.

State ex rel. J.D.W. v. Harris, 319 S.E.2d 815 (1984) (McHugh, C.J.)

Applies standard set forth in syl. pt. 1, *State ex rel. M.C.H. v. Kinder*, 317 S.E.2d 150 (W.Va. 1984) found above.

The Supreme Court found in this case that although the relators were not currently subjected to the misconduct of which they complained, the misconduct was capable of repetition and presented issues of great public interest. The respondents' motions to dismiss the actions on grounds of mootness were denied.

MUNICIPAL COURT

Right to jury trial

Champ v. McGhee, 270 S.E.2d 445 (1980) (Neely, C. J.)

See JURY Municipal court, (p. 333) for discussion of topic.

Scott v. McGhee, 324 S.E.2d 710 (1984) (Harshbarger, J.)

Relator was charged with violating two city ordinances punishable by a jail term and a fine. The same offense under state law for at least one of the offenses carries a heavier confinement penalty. Relator requested a jury trial on the charges. The municipal judge refused the request, dismissed the municipal charges, and suggested to the arresting officer that he could secure warrants upon the dismissal in municipal court. The respondent municipal judge conceded criminal defendants are not afforded jury trials in police court, but that the procedures set forth in *Champ v. McGhee*, 270 S.E.2d 445 (W.Va. 1980) are followed in that when an offense carries a jail sentence, he either states that no jail sentence will be imposed or he requests that the accused waive his right to a jury trial. When the defendant demands a jury trial and the municipal judge believes a jail term may be imposed, he dismisses the municipal charge and advises the arresting officer to pursue criminal charges under state law.

The Court found the respondent's practice does not to an extent accord with that suggested in Champ and that they recognized in Champ that municipal police authorities could elect to bring criminal charges under either municipal ordinance or state statute. The Court found they were only observing the existence of concurrent jurisdiction in magistrate court and stating that local authorities could elect under which they would proceed.

Syl. pt. 2 - The due process clause of Article III, § 10 of the Constitution of West Virginia prohibits a municipal court judge from dismissing municipal charges solely because the accused has exercised his constitutional right to a jury trial, when the penalty under state law for the same offense carries a heavier jail sentence than provided for by municipal ordinance.

The Court found the decree of coercion in this case is so great the relator has little choice but to waive his right to a jury trial to avoid a potential longer jail term.

Right to jury trial (continued)

Scott v. McGhee, (continued)

The Court found that insofar as section 60 of the municipal code in question prohibits jury trial for violations of municipal ordinances that have confinement penalties, it is unconstitutional.

Syl. pt. 3 - Municipalities have the power to summon and compensate jurors, such power being necessarily and fairly implied as an incident to the express powers they have been granted by *W.Va. Code*, 8-12-5 to arrest, convict, and punish criminal conduct violating municipal ordinances.

The Court found municipal courts may summon people to serve on municipal court juries by a request in writing to the circuit clerk who shall certify a list of jurors from the panel of jurors selected to serve on circuit court petit juries. The jury cost consistent with state law are the obligation of the municipality.

The Court prohibited the dismissal of the municipal charges against the relator and prohibited any other proceeding against relator on these charges except by way of trial by jury in municipal court.

NEW TRIAL - NEWLY DISCOVERED EVIDENCE

In general

State v. Tamez, 290 S.E.2d 14 (1982) (McHugh, J.)

Applies standard set forth in syl. pt. 2 of *State v. Stewart*, 239 S.E.2d 777 (W.Va. 1977). (Found in Vol. I under this topic.)

The confidential informant neither witnessed the sale nor overheard the conversation between the narcotics agent and the defendant. While the informant's statement, obtained by defendant subsequent to his conviction for delivery of a controlled substance, in some ways contradicted or added to the testimony of the undercover narcotics agent, the statement, in part, supported that testimony. The informant's assertion that the defendant was under the influence of drugs was cumulative of the defendant's testimony; therefore, the trial court did not commit error in refusing to grant a new trial on the defendant's assertion of newly discovered evidence.

State v. Sparks, 298 S.E.2d 857 (1982) (Per Curiam)

Applies standard set forth in syl. pt. 1, *Halstead v. Horton*, 38 W.Va. 727, 18 S.E. 953 (1894). See *State v. Frazier*, 253 S.E.2d 534 (W.Va. 1979). (Found in Vol. I under this topic.)

The Supreme Court has observed that "[a] new trial on the ground of after-discovered evidence or newly discovered evidence is very seldom granted and the circumstances must be unusual or special." Syl. pt. 9, *State v. Hamric*, 151 W.Va. 1, 151 S.E.2d 252 (1966).

In this case, a witness in the appellant's trial for arson subsequently signed a statement in which he confessed to setting the fire.

The special judge considered the close relationship between the witness and the appellant, his prior inconsistent statements about his involvement in the fire and the indefiniteness of his testimony. The judge found that the newly-discovered evidence would not produce any different result at a new trial and overruled the motion.

The Supreme court found that in light of the fact the witness testified for the appellant at trial, they found it difficult to believe that this evidence could have been discovered before trial, by the exercise of due diligence on the part

In general (continued)

State v. Sparks, (continued)

of the appellant. The Supreme Court was inclined to disapprove of a motion for a new trial based upon newly-discovered evidence which comes from the testimony of a witness who testified for the movant in the first trial. Further, the Court found there was substantial evidence to support the judge's finding that this evidence would not have produced a different result. All of the requirements of *Halstead* must be satisfied before a new trial will be granted. The Court concluded that the special judge did not abuse his discretion and did not err in denying the appellant's motion.

Fluharty v. Wimbush, 304 S.E.2d 39 (1983) (Per Curiam)

Applies standard set forth in syl. pt. 2, *State v. Stewart*, 239 S.E.2d 777 (W.Va. 1977). (Found in Vol. I under this topic.)

Motion for new trial based upon newly-discovered evidence that would only impeach credibility and would not necessarily change the trial result was properly denied under the *Stewart* test.

State v. Beckett, 310 S.E.2d 883 (1983) (Miller, J.)

The appellant was convicted of aggravated robbery. After the trial he presented evidence to show that the State's witness had refused to discuss the case with the defendant's attorney, which the witness denied at trial. The appellant argued on appeal that this newly-discovered evidence should be the basis for a new trial.

Applies standard set forth in syl. pt. 1, *Halstead v. Horton*, 38 W.Va. 727, 18 S.E. 953 (1894). See *State v. Frazier*, 253 S.E.2d 534 (W.Va. 1979). (Found in main text under this topic.)

The Supreme Court noted that in *State v. Stewart*, 239 S.E.2d 777 (W.Va. 1977) they granted a new trial where the newly discovered evidence not only impeached the State's principal witness but also furnished support for the defendant's alibi defense.

In general (continued)

State v. Beckett, (continued)

The Supreme Court found in this case, the fact that the State's witness refused to talk with the defense attorney did not contradict any of his substantive trial testimony.

Syl. pt. 8 - A motion for a new trial based on after-discovered evidence will generally be refused when the sole object of the evidence is to discredit or impeach a witness on the opposite side.

State v. King, 313 S.E.2d 440 (1984) (Per Curiam)

The appellant contends the trial court should have granted his motion for a new trial based on newly-discovered evidence. The evidence relied on was a written confession made after trial by a third person.

Applies standard set forth in syl. pt. 1, *Halstead v. Horton*, 18 S.E. 953 (W.Va. 1894). See *State v. Frazier*, 253 S.E.2d 534 (W.Va. 1979) found in main text under this topic.

The appellant was convicted of uttering a forged instrument. After the trial, William Carter prepared a notarized letter confessing to the uttering charge for which the appellant was convicted. After a hearing, the trial court denied the motion for a new trial on the grounds that the confession was not newly discovered and due diligence was not exercised to present the evidence at trial.

The Supreme Court found a confession by another person does not invariably require a new trial, and that the integrity of the confession is for the trial court.

The Supreme Court found the appellant did not meet the requirements for a new trial. They found the evidence was not newly discovered since the appellant testified at the hearing that Carter had confessed to him prior to trial. Also, the Court found due diligence was not exercised to secure the evidence from Carter. The Court noted that apparently no effort was made to secure this testimony at trial even though the defense presented evidence that Carter, not the appellant committed the offense.

In general (continued)

State v. King, (continued)

Appellant's counsel asserted he could not have secured Carter's confession at trial because Carter would have invoked the Fifth Amendment if called as a witness. The Supreme Court found no merit in this assertion because the argument is premised on the unsupported assumption that Carter would have relied on the Fifth Amendment. The Court noted had Carter been called to testify and relied on his constitutional rights not to incriminate himself, the trial court could have compelled his testimony under a grant of immunity.

Furthermore, the Court found that whether Carter's confession would probably lead to an acquittal at retrial was far from clear. The Supreme Court found no error in denying the motion.

State v. Howerton, 329 S.E.2d 874 (1985) (Miller, J.)

Appellant contends the trial court erred in refusing to grant a new trial based on newly discovered evidence. One of the State's witnesses, who testified about incriminating oral statements made by the defendant, recanted her testimony after trial. She stated she had lied at trial because she had been threatened by another State's witness. The Court applied the standard set forth in the syllabus of *State v. Frazier*, 253 S.E.2d 534 (W.Va. 1970).

The Court found, taking the State's evidence as a whole, it is clear that the witnesses testimony in question was only cumulative and the trial court was correct in denying the motion for a new trial.

PAROLE

Appellate review

Stanley v. Dale, 298 S.E.2d 225 (1982) (Per Curiam)

Applies standard set forth in syl. pt. 3, *Rowe v. Whyte*, 280 S.E.2d 301 (W.Va. 1981). (Found in Vol. I under this topic.)

Discretion of parole board

Adams v. Circuit Court of Randolph County, 317 S.E.2d 808 (1984) (Miller, J.)

See HABEAS CORPUS Procedure, (p. 214) for discussion of topic.

Petitioner plead guilty to breaking and entering in the Circuit Court of Wayne County and was sentenced to one to ten years. He was released on parole and, approximately three months later, plead guilty to receiving stolen property in the Circuit Court of Cabell County and was sentenced to one to ten years, to run consecutively with the prior sentence. The Parole Board revoked his parole and advised petitioner he must serve two years for the original felony and the minimum one year term for the second felony before he could again become eligible for parole. Petitioner contends the Parole Board has no authority to require him to serve three years before again becoming eligible for parole, and that such action constitutes cruel and unusual punishment and is barred by double jeopardy principles.

Syl. pt. 5 - The West Virginia Board of probation and Parole is explicitly authorized by *W.Va. Code*, 62-12-19, to require a parolee to serve all or any portion of the maximum sentence on which he was given parole when there has been a revocation of such parole.

The Court found the facts of this case present no double jeopardy problem. Petitioner is being punished for two separate criminal offenses. The Court also rejected petitioners cruel and unusual punishment claim. They found the sentences are statutorily prescribed as indeterminate and were aware of no decision holding the imposition of a consecutive sentence in this case constitutes cruel and unusual punishment.

PAROLE

Due process

Stanley v. Dale, 298 S.E.2d 225 (1982) (Per Curiam)

Applies standards set forth in syl. pt. 4, *Tasker v. Mohn*, 267 S.E.2d 183 (W.Va. 1980). (Found in Vol. I under this topic.)

The relator contended that the second and the fifth guidelines of *Tasker*, were not met in this case. The Supreme Court disagreed. The Second standard of syl. pt. 2 of *Tasker* states that an inmate is entitled to access to information in his file which will be used to determine whether he receives parole. This is, however, a conditional entitlement which does not exist when security considerations dictate otherwise.

Here, the Supreme Court found the record indicated that the members of the Parole Board considered community sentiment in their decision not to grant parole. The record did not reveal precisely what information the Board considered pertaining to community sentiment, but it was clear to the Court that one of the Board members had information before him that "certain people" felt that the relator should be incarcerated because he had been involved in drug sales for some time before his arrest. The Court found the transcript indicated the Board considered this information to be confidential and it was therefore not given to the relator in the pre-parole report he received. The Court found that the record did not disclose whether the community sentiment information fell outside of the security principle in *Tasker*, nor were the depositions from board members in the record to help determine to what extent community sentiment was relied on by the Board in reaching their decision.

The Supreme Court found that the relator did not carry the burden of proof and that the evidentiary development was inadequate to sustain a finding that he was deprived of his constitutional rights. The Court could not say with any degree of certainty that the Parole Board would not have granted parole to the relator in the absence of their consideration of community sentiment.

The fifth guideline of syl. pt. 2 of *Tasker* states: "Inmates to whom parole has been denied are entitled to written statements of the reasons for denial." The relator argued that the reasons given by the Board for denying his parole were very superficial and did not adequately explain why his parole was denied.

PAROLE

Due process (continued)

Stanley v. Dale, (continued)

The Supreme Court found that the Parole Board considered positive as well as negative factors in their decision and the reasons behind each factor were adequately stated. The Court could not say that the Board acted arbitrarily and capriciously in denying parole. The Board did not restrict its inquiry to the relator's past criminal activity and the pre-sentence investigation report. The Board inquired into the relator's prison conduct and work record and also considered his participation in various prison programs and his psychological condition. The Board is required to do more to meet the minimum requirements of *W.Va. Code*, 62-12-13 (1976) and *Tasker*.

PATERNITY

Instructions

State v. Pryor, 304 S.E.2d 681 (1983) (Per Curiam)

The Supreme Court found that since the appellant in a paternity action was entitled to many of the protections afforded criminal defendants, including proof of his paternity beyond a reasonable doubt, it followed that criminal due process entitled him to an instruction on the presumption of innocence.

Standard of proof

State v. Pryor, 304 S.E.2d 681 (1983) (Per Curiam)

Applies standard set forth in syl., *State ex rel. Toryak v. Spagnuolo*, 292 S.E.2d 654 (W.Va. 1982) found in the main text under this topic.

Statute of limitations

State ex rel. Adkins v. Hosey, 310 S.E.2d 206 (1983) (Per Curiam)

In this paternity action, the child in question was born Feb 19, 1976. On June 6, 1978 a warrant was issued by a magistrate charging that the respondent fathered the child. The relator was permitted to withdraw the complaint and warrant on March 19, 1981, after the respondent promised to pay support. The respondent did not pay and the relator moved to revive the warrant in magistrate court on August 28, 1981. The magistrate held that the magistrate court lacked jurisdiction to compromise or dismiss a paternity action and remanded the original warrant to the sheriff for execution. The respondent appeared in circuit court and moved to dismiss contending the warrant was reinstituted after the three year statute of limitations for paternity proceedings had run. The circuit court dismissed the case.

"The arbitrary imposition of a three year limitation of actions to establish paternity established by *W.Va. Code*, 48-7-1 [1969] is unconstitutional under *W.Va. Const*. Art III, §§ 10 and 17." Syl. pt. 1, *State ex rel. S.M.B. v. D.A.P.*, 284 S.E.2d 912 (W.Va. 1981).

PATERNITY

Statute of limitations (continued)

State ex rel. Adkins v. Hosey, (continued)

The Supreme Court found that any decision by the circuit court based upon the three year limitations of actions period set forth in Code 48-7-1 constituted reversible error. The Court also was of the opinion that the magistrate court was without jurisdiction to compromise or dismiss a bastardy proceeding and that the original warrant, was still of legal force and effect at the time of the circuit court's action and the state could proceed upon the merits of the case.

Sufficiency of evidence

State v. Pryor, 304 S.E.2d 681 (1983) (Per Curiam)

The appellant alleged the evidence was insufficient to sustain the verdict because no penetration was proved and the State failed to introduce evidence that pregnancy could result without actual intercourse. The Supreme Court noted the prosecutrix denied any sexual contact with men other than the appellant; nevertheless, she became pregnant. The Court believed the jury was entitled to decide whether her testimony proved the appellant was the father of her child.

PLEA BARGAINING

In general

Myers v. Frazier, 319 S.E.2d 782 (1984) (Miller, J.)

Petitioner, as a concerned citizen, seeks to have three deputy sheriffs tried on charges of sexual assault, false swearing and related offenses. She seeks to keep the special judge from entering any order granting immunity to Deputy Pennington and from accepting plea bargain agreements entered into by Deputies Brown and Dempsey and the special prosecutor in this case. She also seeks to compel the special prosecutor to withdraw his promise of immunity to Pennington and to prosecute Pennington on sexual assault and false swearing related charges.

Deputies Demspey and Brown were indicted for fist degree sexual assault. The special prosecutor filed an information against them charging each with conspiring to commit false swearing and additionally charging Brown with procuring false swearing and Dempsey with three counts of committing false swearing. Dempsey agreed to plead nolo contendere to one count of false swearing in return for the dismissal with prejudice of the other charges. It appears the special prosecutor agreed to this and both agreed that probation for not more than five years, leaving the imposition of a fine up to the judge, would be appropriate. Brown agreed not to be a county or city police officer in Fayette County for five years in exchange for dismissal of the charges with prejudice. The special judge accepted the proposed agreement orally. No final written judgement was entered. Pennington was offered a grant of immunity by the special prosecutor if he would cooperate in the prosecution of the other two. Pennington was never indicted for any offense. No court order was entered granting immunity.

Syl. pt. 1 - With the advent of Rule 11 of the West Virginia Rules of Criminal Procedure, a detailed set of standards and procedures now exists governing the plea bargaining process.

Syl. pt. 2 - "West Virginia Rules of Criminal Procedure, Rule 11, gives a trial court discretion to refuse a plea bargain." Syllabus point 5, *State v. Guthrie*, 315 S.E.2d 297 (W.Va. 1981).

Syl. pt. 3 - Under Rule 11(e)(2) of the West Virginia Rules of Criminal Procedure, the power is vested in the circuit court to accept or reject a plea agreement or to defer acting on it until the court obtains a presentence report under Rule 32 (c) of the West Virginia Rules of Criminal Procedure.

In general (continued)

Myers v. Frazier, (continued)

Syl. pt. 4 - A court's ultimate discretion in accepting or rejecting a plea agreement is whether it is consistent with the public interest in the fair administration of justice.

Syl. pt. 5 - As to what is meant by a plea bargain being in the public interest in the fair administration of justice, there is the initial consideration that the plea bargain must be found to have been voluntarily and intelligently entered into by the defendant and that there is a factual basis for his guilty plea. Rule 11(d) and (f). In addition to these factors, which inure to the defendant's benefit, we believe that consideration must be given not only to the general public's perception that crimes should be prosecuted, but to the interest of the victim as well.

Syl. pt. 6 - A primary test to determine whether a plea bargain should be accepted or rejected is, in light of the entire criminal event and given the defendant's prior criminal record whether the plea bargain enables the court to dispose of the case in a manner commensurate with the seriousness of the criminal charges and the character and background of the defendant.

Syl. pt. 7 - A plea agreement may be both reasonable and necessary when it is designed to secure a legitimate and important prosecutorial interest.

Syl. pt. 8 - To ensure that the trial court properly exercises its discretion in accepting or rejecting plea agreements, it is incumbent upon the prosecutor to inform the court of his reasons for proposing the plea agreement.

Syl. pt. 9 - A trial court has the right to be informed not only of the terms of the agreement, but also of the circumstances surrounding the criminal episode which is covered by the plea bargain. Additionally, a court is entitled to secure all relevant information surrounding the background, prior criminal record, and the degree of criminal involvement of the defendant to assist it in whether to accept or reject the tendered plea bargain.

Syl. pt. 10 - "Though the rule at common law is otherwise, the practice long followed in Virginia, before the separation, and since then in trial courts of this state has become crystalized into our law, and a *nolle prosequi* entered

In general (continued)

Myers v. Frazier, (continued)

without the consent of the court will be unavailing to discharge the accused from prosecution." Syllabus point 2, *Denham v. Robinson*, 72 W.Va. 243, 77 S.E.2d 970 (1913).

Syl. pt. 11 - The requirement that a dismissal of criminal charges is ineffective without the consent of the court is incorporated into Rule 48(a) of the West Virginia Rules of Criminal Procedure, which basically follows Rule 48(a) of the Federal Rules of Criminal Procedure. There is ample federal and state authority for the proposition that under such rule, specific reasons must be given by the prosecutor for dismissal so that the trial court judge can competently decide whether to consent to the dismissal.

Syl. pt. 12 - Most courts hold that as a general rule, a trial court should not grant a motion to dismiss criminal charges unless the dismissal is consonant with the public interest in the fair administration of justice. The public interest standard is the same as the standard applied to the acceptance of plea agreements under Rule 11.

The Supreme Court found the considerations applied to determining whether to accept or reject a plea bargain apply to the dismissal of criminal charges. Here the Court found the special prosecutor's general statements that a dismissal of charges was appropriate in the case was not specific enough to support the dismissal. The Supreme Court found the prosecutor should give a statement of the facts and specific reasons to the trial judge so the judge has some basis for concluding the dismissal of charges is warranted. The Court found this was not done. The Court also found the dismissal of the charges is not completed until the special judge enters a written order dismissing the indictments or information.

Syl. pt. 13 - The entry of a *nolo contendere* or a guilty plea pursuant to a plea bargain and an oral pronouncement of a sentence by a circuit court does not impose a double jeopardy bar where the defendant has not served any portion of the sentence.

The Court found the idea that double jeopardy attaches when a plea is accepted is inconsistent with the complex nature of plea bargaining and

PLEA BARGAINING

In general (continued)

Myers v. Frazier, (continued)

impeded the authority of a court to ultimately decide whether the agreement serves the interests of justice. They concluded in this case the oral acceptance of Dempsey's nolo plea and oral imposition of sentence did not impose a double jeopardy bar where Dempsey had served none of his sentence.

Syl. pt. 14 - Under Rule 11 of the West Virginia Rules of Criminal Procedure a trial court is not foreclosed from accepting a plea, which is made pursuant to a plea agreement, and conditioning its acceptance upon the receipt of s presentence report. After considering the presentence report, the trial court may reject the plea agreement, in which event it shall permit the defendant to withdraw his plea, pursuant to the procedure outlined in Rule 11(e)(4) of the West Virginia Rules of Criminal Procedure.

The Court found the trial judge is not bound to his initial oral acceptance of Brown and Dempsey's pleas, but may, upon further reflection or additional information, find the agreements do not serve the best interests of the public and reject them. Dempsey must, however, be given the opportunity to withdraw his *nolo* plea.

The respondents challenge petitioner's standing to maintain a writ of prohibition.

Syl. pt. 15 - "As a general rule any person who will be affected or injured by the proceeding which he seeks to prohibit is entitled to apply for a writ of prohibition; but a person who has no interest in such proceeding and whose rights will not be affected or injured by it can not do so." Syllabus point 6, *State ex rel. Linger v. County Court of Upshur County*, 150 W.Va. 207, 144 S.E.2d 6189 (1965).

The Court found the special judge should review the reasons advanced by the special prosecutor for the plea agreements and consider whether they should be finally accepted. Since this lies within the judge's discretion, the Court declined to issue writ of prohibition.

In general (continued)

Myers v. Frazier, (continued)

Petitioner also seeks to compel the special prosecutor to withdraw the grant of immunity given to Pennington and seek to indict him on sexual assault and false swearing related charges, and to nullify the agreements against Brown and Dempsey and prosecute them on the charges.

Syl. pt. 16 - Most Courts have held that in the absence of some express constitutional or statutory provision, a prosecutor has no inherent authority to grant immunity against prosecution.

The Court found it was not necessary to consider whether petitioner is entitled to relief in mandamus since the special prosecutor had no inherent authority to grant immunity to Pennington against prosecution nor did he have authority, absent the court's consent, to grant immunity under *W.Va. Code* 57-5-2.

Syl. pt. 17 - A person who seeks a mandamus to compel prosecution must possess the necessary facts to establish probable cause or stand in some special position such as being the victim of a crime or a close relative of the victim if the victim is deceased or otherwise incapacitated from assisting in the prosecution of the crime. The action must be filed in a circuit court, which can make the necessary findings of fact more efficiently than we can in this Court.

The Court found the petitioner did not allege facts that bring her into a standing posture in this case with regard to requiring the prosecution of Dempsey and Brown. The Court found even if petitioner could demonstrate standing with regard to Pennington's situation, mandamus should not be brought originally in the Supreme Court since the issue of probable cause is a factual issue best developed at the circuit court level.

PLEA BARGAINING

Breach of agreement

State v. Jarvis, 310 S.E.2d 467 (1983)

Appellant was convicted of speeding, refusing to display his automobile registration card on demand, illegally hindering or obstructing a police officer in the exercise of his official duty, and reckless driving.

After his conviction, the prosecution orally agreed to recommend probation if he would cooperate with the authorities by providing information. The facts surrounding this agreement were developed at the sentencing hearing. Sentencing was delayed to permit the appellant to supply information. The appellant said he had not. The probation department initially recommended probation in the case but after further investigation at the direction of the trial court made an unfavorable recommendation. The Supreme Court noted the probation department apparently changed their recommendation after investigating whether the appellant had in fact supplied information to the police.

The Supreme Court found the trial judge unequivocally stated that he would not have granted probation in any event. He stated that even before the dispute concerning the appellant's cooperation he had decided to deny probation based on his record and notwithstanding the initial recommendation of the probation department.

The Supreme Court concluded the appellant was entitled to no relief in connection with the sentences imposed.

Court's failure to accept

State v. Guthrie, 315 S.E.2d 397 (1984) (Harshbarger, J.)

In this case, the trial court refused to accept the plea agreement the appellant had with the prosecutor. The Supreme Court noted that Rule 11 of the West Virginia Rules of Criminal Procedure gives a trial court discretion to refuse a plea bargain and that our rule copies the federal rule.

The Supreme Court concluded a trial judge has the discretion to refuse a plea bargain, if he follows the procedure prescribed in that rule. *State ex rel. Roark v. Casey*, 286 S.E.2d 702 (1982). The Court found this was done here.

PLEA BARGAINING

Court's failure to accept (continued)

State v. Guthrie, (continued)

Syl. pt. 5 - West Virginia Rules of Criminal Procedure, Rule 11, gives a trial court discretion to refuse a plea bargain.

Pre-sentence investigation prior to entry of plea

State ex rel. Simpkins v. Harvey, 305 S.E.2d 268 (1983) (McGraw, C.J.)

See GUILTY PLEAS Pre-sentence investigation prior ro entry of plea, (p. 209) for discussion of topic.

Specific performance

State ex rel. Simpkins v. Harvey, 305 S.E.2d 268 (1983) (McGraw, C.J.)

See GUILTY PLEAS Pre-sentence investigation prior ro entry of plea, (p. 209) for discussion of topic.

State v. Hodges, 305 S.E.2d 278 (1983) (McHugh, J.)

Appellant was convicted of carrying a dangerous and deadly weapon without a license. Prior to trial, negotiations regarding a possible plea bargain were had. The appellant indicated his willingness to plead guilty in return for assurances that no jail sentence would be requested by the State or imposed by the Court. The assistant prosecutor relied on a conversation with the judge in telling defense counsel that an agreement had been reached which met with the judge's approval. The Judge recalled telling the assistant prosecutor that he was not interested in seeing the appellant go to jail and indicated that he intended to levy a substantial fine. The appellant appeared without counsel on the day the case was called for trial. At some point in the proceedings he became aware that the court intended to impose a suspended sentence of one year. He requested that the proceedings be continued until the following day to allow counsel to be present. The Court acceded and the next day defense counsel appeared with appellant. Various pre-trial motions were made at that

Specific performance (continued)

State v. Hodges, (continued)

time, including a motion to recuse the judge and a motion for a continuance, both of which were denied. The case proceeded to trial that day and concluded the same day.

The appellant contended the trial judge erred in failing to enforce the plea bargain agreement and in failing to grant a continuance. In addressing the issue of whether the agreement bound the trial judge not to impose a suspended sentence, the Supreme Court found that W.Va. cases have consistently held that in order to bind the state to its bargain a defendant must have acted to his substantial detriment. The Court noted the only detriment suffered was appellant's failure to subpoena a witness in reliance on the supposed agreement and that appellant could have easily been restored to the position he held before the bargain had the trial court but granted his request for continuance. The Court concluded that appellant was not entitled to specific performance of any plea bargain which may have been reached.

The Court did find that the failure to grant a continuance clearly prejudiced appellant and in these circumstances it was an abuse of the court's discretion to deny a continuance.

POSSE COMITATUS

Use of army or air force to execute the laws of this state

State v. Maxwell, 328 S.E.2d 506 (1985) (Brotherton, J.)

See EMPLOYMENT OF OUTSIDE RESIDENTS TO PERFORM POLICE WORK *W.Va. Code* §61-6-11, (p. 151) for discussion of topic.

State v. Presgraves, 328 S.E.2d 699 (1985) (Per Curiam)

See EMPLOYMENT OF OUTSIDE RESIDENTS TO PERFORM POLICE WORK *W.Va. Code* §61-6-11, (p. 151) for discussion of topic.

PRE-INDICTMENT DELAY

In general

State v. Richey, 298 S.E.2d 879 (1982) (Miller, C. J.)

In this case the crime allegedly occurred on February 22, 1979, and the grand jury indictment was returned on June 19, 1979. The defendant was not arrested prior to the returning of the indictment. The defendant claimed that the delay was prejudicial in that investigative facts could not be gathered.

The Supreme Court found that here, the record is silent as to any specific facts that would demonstrate why the approximate three-month delay had prejudice the defendant. The motion to dismiss was filed six months after the returning of the indictment, and asserted only general grounds.

Syl. pt. 1 - The general rule is that where there is a delay between the commission of the crime and the return of the indictment or the arrest of the defendant, the burden rests initially upon the defendant to demonstrate how such delay has prejudiced his case if such delay is not *prima facie* excessive.

The Supreme Court concluded that the defendant had failed to demonstrate any facts which would show prejudice by the delay.

State ex rel. Bess v. Hey, 301 S.E.2d 580 (1980) (Per Curiam)

When pre-indictment delay is not presumptively prejudicial to the defendant, the trial court, in determining if defendant's due process rights have been violated, must weigh the reasons for delay against the impact of the delay upon the defendant's ability to defend himself.

"The effects of less gross delays upon a defendant's due process rights must be determined by a trial court by weighing the reasons for delay against the impact of the delay upon the defendant's ability to defend himself." *State ex rel. Leonard v. Hey*, 269 S.E.2d 394 (W.Va. 1980).

Applies standard set forth in syl. pt. 1, *State v. Richey*, cited above.

Where defendant failed to present evidence indicating that a 20-month delay between arrest and indictment had prejudiced him in his ability to defend himself, he failed to meet his burden under *State v. Richey*.

PRE-INDICTMENT DELAY

In general

State ex rel. Bess v. Hey, (continued)

Absent a showing of prejudice, trial judge is correct in refusing to dismiss charges when defendant's motion is based upon pre-indictment delay.

State v. Bennett, 304 S.E.2d 28 (1983) (Per Curiam)

The appellant contended that he was prejudiced by the nearly seven-month delay in obtaining the indictment, in that he was unable to account for his whereabouts on the day in question.

The Supreme Court found that the seven month delay was not *prima facie* excessive or prejudicial and that the appellant did not meet his burden of going forward with evidence of prejudice, therefore the State was not required to prove the reasonableness of the delay. The Court noted that the appellant's indictment was the product of an extensive undercover operation and the State did not conduct its chemical analysis of the controlled substance until September (approximately four months before indictment.) The Supreme Court concluded that any delay was reasonable and the trial court did not abuse its discretion in refusing to quash the indictment.

State v. Simmons, 301 S.E.2d 812 (1983) (Per Curiam)

Applies standard set forth in syl. pt. 1, *State v. Richey*, 298 S.E.2d 879 (W.Va. 1982), cited above.

Appellant was not indicted or otherwise charged until 17 months after the search and seizure of marijuana. He claimed prejudice due to intentional delay by which prosecution sought to gain tactical advantage over him, but he failed to show how she had been prejudiced. Appellant argued that his allegation of prejudice without supporting facts shifted the burden to the State to show that the delay was reasonable. The Court applied syl. pt. 1 of *State v. Richey*, *supra*, to reject appellant's argument.

A 17 month delay between search and seizure of marijuana and indictment was not *prima facie* excessive.

PRELIMINARY HEARING

Failure to conduct

State v. Sheppard, 310 S.E.2d 173 (1983) (McGraw, J.)

The Supreme Court found that since there is no constitutional right to a preliminary hearing, and since the appellant in this case was properly indicted by a grand jury less than three weeks after his arrest, the failure to afford him a preliminary hearing does not constitute grounds for reversing his conviction.

Right to counsel

State v. Stout, 310 S.E.2d 695 (1983) (McHugh, J.)

The appellant was convicted of sexual assault in the third degree. In *State v. Stout*, 285 S.E.2d 892 (W.Va. 1982), the Supreme Court remanded the case to the circuit court for a hearing upon the question of whether the holding of the appellant's preliminary hearing in the absence of the appellant's attorney was harmless error. The trial court upon remand found the error harmless and appellant appealed.

The appellant, 31 at the time, allegedly sexually assaulted a ten year old. The appellant had been living with the child's mother. The appellant's preliminary hearing was held in his attorney's absence. The appellant was subsequently indicted and convicted of sexual assault in the third degree.

The Supreme Court has held the failure to observe a constitutional right is reversible error unless harmless beyond a reasonable doubt. The rule has been applied to the right to have counsel at a preliminary hearing.

The U.S. Supreme Court in *Coleman v. Alabama*, 399 U.S. (1970) held that the preliminary hearing was a "critical stage" in the prosecution of a defendant and the absence of counsel at the hearing was error. The U.S. S.Ct. set forth four reasons for the necessity of defense counsel at preliminary hearings:

> Plainly the guiding hand of counsel at the preliminary hearing is essential to protect the indigent accused against an erroneous or improper prosecution. First, the lawyer's skilled examination and cross examination of witnesses may expose

Right to counsel (continued)

State v. Stout, (continued)

> fatal weaknesses in the State's case that may lead the magistrate to refuse to bind the accused over. Second, in any event, the skilled interrogation of witnesses by an experienced lawyer can fashion a vital impeachment tool for use in cross-examination of the State's witnesses at trial, or preserve testimony favorable to the accused of a witness who does not appear at the trial. Third, trained counsel can more effectively discover the case the State has against his client and make possible the preparation of a proper defense to meet that case at the trial. Fourth, counsel can also be influential at the preliminary hearing in making effective arguments for the accused on such matters as the necessity for an early psychiatric examination or bail. 399 U.S. at 9.

The Supreme Court noted this case involves the alleged sexual assault of a young child and the testimony elicited by the state at the preliminary hearing was comparable to the State's evidence at trial. The Court found the appellant lost an important opportunity to effectively interrogate witnesses under oath prior to trial, at least with respect to impeachment, because his preliminary hearing was held in the absence of defense counsel. The record contained evidence that the victim's mother testified at the preliminary hearing. She did not testify at trial. The Court found the appellant lost an opportunity at the hearing to discern her knowledge of the case. The Court found an informal interview of the victim and her mother prior to trial would have constituted an inadequate substitute for the productive role defense counsel could have played at the preliminary hearing while those witnesses were under oath.

The Court reversed and remanded for a new trial.

PRELIMINARY HEARING

Scope

Desper v. State, 318 S.E.2d 437 (1984) (McHugh, C.J.)

Petitioner was arrested for the robbery of a Go-Mart store. At the preliminary hearing the State called only the employee robbed. He described the robbery and identified petitioner as the one committing the crime. Two police officers, Detective Lee and another, were present at the preliminary hearing but were not called by the State, Defense counsel attempted to call theses officers to elicit testimony about a possible inconsistency between the arrest warrant and the testimony of the victim, the identification of the defendant by the victim, and the written statement made by the victim to the police. The State objected, claiming the defense was only attempting to engage in discovery of the State's case by calling these witnesses. The magistrate sustained the objection and found probable cause. The circuit court refused to award petitioner a new preliminary hearing. Petitioner was subsequently indicted for the offense.

Syl. pt. 1 - A preliminary examination conducted pursuant to Rule 5.1 of the West Virginia Rules of Criminal Procedure serves to determine whether there is probable cause to believe that an offense has been committed and that the defendant committed it; the purpose of such an examination is not to provide the defendant with discovery of the nature of the State's case against the defendant, although discovery may be a by-product of the preliminary examination.

Syl. pt. 2 - In challenging probable cause at a preliminary examination conducted pursuant to Rule 5.1 of the West Virginia Rules of Criminal Procedure, a defendant has a right to cross-examine witnesses for the state and to introduce evidence; the defendant is not entitled during the preliminary examination to explore testimony solely for discovery purposes. The magistrate at the preliminary examination has discretion to limit such testimony to the probable cause issue, and the magistrate may properly require the defendant to explain the relevance to probable cause of the testimony the defendant seeks to elicit.

The Supreme Court found Detective Lee was involved in the three matters defense counsel sought testimony regarding. The Court found the magistrate should have allowed the defense to call Detective Lee to challenge probable

Scope (continued)

Desper v. State, (continued)

cause. The State could have objected had the questioning gone beyond permissible bounds and the magistrate could have exercised discretion in what testimony to allow.

The Court found even though the defendant was indicted, some remedy should be available for the failure of the magistrate to allow the defense to call this witness since the denial could result in some prejudice at trial. The Court found it was appropriate to leave the nature of the relief to the discretion of the trial court and, accordingly, remanded fort his purpose. The Court cited as an example a federal court of appeals case where it was suggested the trial court establish appropriate bounds for an interview of the witness by defense counsel.

PRISON/JAIL CONDITIONS

In general

Mitchell v. Melton, 277 S.E.2d 895 (1981) (Miller, J.)

Syl. pt. 1 - Ordinarily an action under 42 U.S.C.A. § 1983 is appropriate where complaint is made to the conditions of confinement and not its duration.

Hickson v. Kellison, 296 S.E.2d 855 (1982) (Miller, C.J.)

Syl. pt. 2 - An action based on 42 U.S.C.A.§ 1983 can be maintained in our State courts to challenge prison conditions.

Syl. pt. 3 - The Rules of Civil Procedure are available for an action filed under 42 U.S.C.A. § 1983.

Syl. pt. 4 - There is no requirement for formal court certification of the appropriateness of a class action under Rule 23 of the West Virginia Rules of Civil Procedure nor is there any requirement in our Rule 23 as there is in Rule 23(c)(4) of the Federal Rules of Civil Procedure for the use of subclasses.

Syl. pt. 5 - Whether the requisites for the class action exists rests within the sound discretion of the trial court.

Syl. pt. 6 - An order denying class action standing under Rule 23 of the West Virginia Rules of Civil Procedure may be appealed by the party who asserts such class standing.

Classification system

Hackl v. Dale, 299 S.E.2d 26 (1982) (Miller, C.J.)

The petitioner contended that the correctional authorities have failed to segregate the diagnostic population in the classification dorm so that the non-violent are protected from the violent confinees.

PRISON/JAIL CONDITIONS

Classification system (continued)

Hackl v. Dale, (continued)

Syl. pt. 3 - The due process clause does not mandate a system of inmate classification in the initial assignment of offenders to a particular place of confinement. Courts have held that where a state by statute creates a mandatory system of classification, this gives rise to an enforceable right.

Under *W.Va. Code* § 62-13-4(f), the Commissioner of Corrections is required to "establish a system of classification of inmates, through a reception and examination procedure, and in each institution a classification committee and procedure for assignment of inmates with the programs of the institution." Furthermore, *W.Va. Code* §8-5A-7 requires all prisoners who are sent to Moundsville "upon imposition of such sentence to undergo diagnosis and classification at the Huttonsville Correctional Center." [HCC].

The Supreme Court found that the questions of the adequacy of the classification and diagnostic procedures at Dorm 7 of the HCC could not be resolved in this case. They found there is obviously a need for segregating the violent from the non-violent confinees.

Syl. pt. 4 - In the absence of extraordinary circumstances a trial court which directs a criminal defendant to pre-sentence diagnostic procedures under the provisions of *W.Va. Code*, 62-12-7a, or sentences a defendant to the penitentiary, should include with the commitment order copies of any psychological or other diagnostic reports together with any available presentence report made regarding the defendant.

The Supreme court remanded the case to the circuit court of Kanawha County. The Court found the petitioner should remain in the county jail pending disposition of the proceeding or further order of the circuit court. Footnote 4.

PRISON/JAIL CONDITIONS

Closing the prison/institution

State ex rel. Wright v. McCoy, 298 S.E.2d 257 (1982) (Harshbarger, J.)

Syl. pt. - When the legislature gives blanket permission to the executive to establish and operate institutions, the executive may close them.

Leckie Center, a juvenile facility, was established by the Commissioner of Public Institutions pursuant to generalized statutory authority. The Supreme court found that the Commissioner has been delegated authority to "establish, operate, and maintain . . .centers for housing youthful male offenders, and that the authority to close those centers is implicit in the authorization."

Cruel and unusual punishment

Hackl v. Dale, 299 S.E.2d 26 (1982) (Miller, C.J.)

Syl. pt 2 - A prisoner has a right, secured by the Eighth and Fourteenth Amendments, to be reasonably protected from constant threat of violence and sexual assault by his fellow inmates, and he need not wait until he is actually assaulted to obtain relief. In order to meet the foregoing standard two conditions must be shown: (1) Whether there is a pervasive risk of harm to inmates from other prisoners, and, if so, (2) Whether the officials are exercising reasonable care to prevent prisoners from intentionally harming others or from creating an unreasonable risk of harm.

In this case, the petitioner was sentenced to the Anthony Correctional Center following a jury trial in which he was found guilty of aiding and abetting a daytime burglary. While at the Center, he attempted suicide and was sent to Weston State Hospital for a thirty-day emergency observation. He was then transferred to the Huttonsville Correctional Center to await a placement decision. The petitioner was placed in Dorm 7 which is used to house prisoners who have been recently convicted and are undergoing presentence diagnostic classification, and to house post-sentence commitments who are awaiting the determination of their placement within our penal system. While in Dorm 7, the petitioner was allegedly sexually assaulted by a fellow inmate.

PRISON/JAIL CONDITIONS

Cruel and unusual punishment (continued)

Hackl v. Dale, (continued)

The Supreme Court found that the record did not demonstrate the presence of other sexual assaults such that a reasonable fear for safety could be said to have existed or that prison officials would have been reasonably apprised of the existence of the problem and the need for protective measures. The Court was not aware of any decision whereby an isolated incident of sexual assault on one inmate has resulted in a finding that the constitutional prohibition against cruel and unusual punishment has been violated.

Hickson v. Kellison, 296 S.E.2d 855 (1982) (Miller, C.J.)

Syl. pt. 2 - Certain conditions of jail confinement may be so lacking in the area of adequate food, clothing, shelter, sanitation, medical care and personal safety as to constitute cruel and unusual punishment under the Eighth Amendment to the United States Constitution.

Syl. pt. 3 - Independent of any constitutional considerations there are statutory provisions in our State which reflect a legislative mandate that county jails be operated at certain minimal standards.

The Supreme Court found that the combination of conditions existing at the Pocahontas County Jail is sufficient to warrant the conclusion that the Constitutional standards have been violated by the totality of conditions analysis stated in *Dawson v. Kendrick*, 527 F.Supp. 1252 (S.D. W.Va. 1981).

See *Hickson* for a detailed analysis of the jail conditions.

The Supreme Court noted that the respondents indicated a willingness to correct some of the deficiencies and therefore issued a moulded writ of mandamus directing that the respondents within sixty days detail to the petitioner's counsel such corrective action that they will voluntarily undertake. In the event the matters could not be resolved, a special judge was appointed to hear the case.

PRISON/JAIL CONDITIONS

Protective custody

Bishop v. McCoy, 323 S.E.2d 140 (1984) (McHugh, C.J.)

Syl. pt. 1 - "A prisoner has a right, secured by the Eighth and Fourteenth Amendments, to be reasonably protected from constant threat of violence and sexual assault by his fellow inmates, and he need not wait until he is actually assaulted to obtain relief. In order to meet the foregoing standard two conditions must be shown: (1) Whether there is a pervasive risk of harm to inmates from other prisoners, and, if so, (2) Whether the officials are exercising reasonable care to prevent prisoners from intentionally harming others or from creating an unreasonable risk of harm." Syl. pt. 2, *Hackl v. Dale*, 299 S.E.2d 26 (W.Va. 1982).

Syl. pt. 2 - "Inmates incarcerated in West Virginia state prisons have a right to rehabilitation established by *W.Va. Code* §§ 62-13-1 and 62-13-4 (Cum. Supp. 1980), and enforceable through the substantive due process mandate of article 3, section 10 of the West Virginia Constitution." Syl. pt. 2, *Cooper v. Gwinn*, 298 S.E.2d 781 (W.Va. 1981).

Syl. pt. 3 – Protective custody inmates, as well as other prison inmates in the West Virginia correctional system, have rights, as described in *Hackl v. Dale*, 299 S.E.2d 26 (W.Va. 1982), and *Cooper v. Gwinn*, 298 S.E.2d 781 (W.Va. 1981), to (1) reasonable protection form constant threat of violence and sexual assault by fellow inmates and (2) rehabilitation.

Syl. pt. 4 - In securing the rights of protective custody inmates to reasonable protection from constant threats of violence and sexual assault and to rehabilitation, the Commissioner of the West Virginia Department of Corrections is hereby directed to (1) establish and maintain, in addition to the safeguarding of protective custody inmates in the West Virginia Penitentiary at Moundsville, protective custody facilities for the safeguarding, for such periods of time as may be required, of protective custody inmates of institutions other than the West Virginia Penitentiary at Moundsville, and such facilities shall be in addition to the Protective Custody Unit at the West Virginia Penitentiary at Moundsville and shall be at a location or locations other than at the penitentiary at Moundsville; (2) ensure that all protective custody inmates, whether of the West Virginia Penitentiary at Moundsville or otherwise, shall, in continuing their rehabilitation, be entitled to the same educational, vocational, recreational and other program opportunities to

PRISON/JAIL CONDITIONS

Protective custody (continued)

Bishop v. McCoy, (continued)

which other prison inmates in this State are entitled and (3) ensure that no prison inmate under the supervision of the West Virginia Department of Corrections who is not a maximum security inmate is transferred, solely for the purpose of placing that inmate in protective custody, to a maximum security institution.

Remedy

Hackl v. Dale, 299 S.E.2d 26 (1982) (Miller, C.J.)

Applies standard set forth in syl. pt. 1, *State ex rel. Pingley v. Coiner*, 155 W.Va. 591, 186 S.E.2d 220 (1972). (See *State ex rel. K.W. v. Werner*, 242 S.E.2d 907 (W.Va. 1978). (Found in Vol. I under this topic.)

Hickson v. Kellison, 296 S.E.2d 855 (1982) (Miller, C.J.)

Applies standard set forth in syl. pt. 1, *State ex rel. Pingley v. Coiner*, 155 W.Va. 591, 186 S.E.2d 220 (1972). (See *State ex rel. K.W. v. Werner*, 242 S.E.2d 907 (W.Va. 1978). (Found in Vol. I under this topic.)

Statutory provisions

Hickson v. Kellison, 296 S.E.2d 855 (1982) (Miller, C.J.)

See PRISON/JAIL CONDITIONS Cruel and unusual punishment, (p. 416) for discussion of topic.

See *Hickson* for a summary of the statutory provisions.

PROBATION

In general

State ex rel. Simpkins v. Harvey, 305 S.E.2d 268 (1983) (McGraw, C.J.)

See DRUNK DRIVING Probation as a sentencing alternative, (p. 142) for discussion of topic.

See GUILTY PLEAS Pre-sentence investigation prior to entry of plea, (p. 209) for discussion of topic.

Eligibility for probation

State v. Miller, 310 S.E.2d 479 (1983) (McGraw, C.J.)

The appellant plead guilty to a Harrison County arson charge and was tried and convicted in Taylor County of disinterment of a dead human body approximately two months later. The circuit court of Taylor county sentenced the appellant to 25 years for the disinterment charge. The trial court, relying on Code 62-12-2, held that because the appellant had been convicted of a felony "within five years from the date hereof," he was ineligible for probation.

The Supreme Court found that the felony conviction used as the basis for denying the appellant probation was the arson committed after the disinterment for which the appellant was being sentenced. The Court found that because the arson occurred after the disinterment, the trial court was not precluded by Code 62-12-2(a) from considering probation as a sentencing alternative for the disinterment conviction.

The Court found the trial court is not required to grant probation but remanded the case to give the trial court an opportunity to consider the probation question.

Syl. pt. 2 - Pursuant to *W.Va. Code* 362-12-2(a), in order to preclude consideration of probation, a previous felony conviction must relate to an offense which occurred prior to the date of the offense for which sentence is being imposed.

PROBATION

Eligibility for probation (continued)

State v. Warner, 308 S.E.2d 142 (1983) (Miller, J.)

Syl. pt. 2 - The plain meaning of *W.Va. Code*, 62-12-2(b), is that its denial of probation is limited to a "person who commits or attempts to commit a felony with the use, presentment or brandishing of a firearm." Therefore, a person who is convicted of the misdemeanor offense of carrying a pistol without a license is not automatically barred from probation consideration under *W.Va. Code* 62-12-2(b).

Here the trial judge denied the defendant's request for probation on the theory that Code 62-12-2(b), was applicable. The Supreme Court noted that the trial court was not automatically required to grant probation, but reversed and remanded the case to give the court an opportunity to reconsider the probation question.

Pre-sentence investigation

State ex rel. Simpkins v. Harvey, 305 S.E.2d 268 (1983) (McGraw, C.J.)

See GUILTY PLEAS Pre-sentence investigation prior to entry of plea, (p. 209) for discussion of topic.

Revocation

In general

State v. Farmer, 315 S.E.2d 392 (1983) (Neely, J.)

See ARREST Warrantless, Home entries, (p. 31) for discussion of topic.

PROBATION

Evidence

Hearsay

State v. Stuckey, 324 S.E.2d 379 (1984) (Per Curiam)

See YOUTHFUL MALE OFFENDERS Transfer from youthful offender center to penitentiary, Admission of hearsay evidence, (p. 618) for discussion of topic.

Juveniles

State ex rel. E.K.C. v. Daughtery, 298 S.E.2d 834 (1982) (Per Curiam)

See JUVENILES Probation, Revocation, (p. 351) for discussion of topic.

Voluntariness of guilty plea

Adkins v. Dale, 299 S.E.2d 871 (1981) (Per Curiam)

See GUILTY PLEAS Voluntariness of plea, (p. 210) for discussion of topic.

PROHIBITION

In general

Naum v. Halbritter, 309 S.E.2d 109 (1983) (Neely, J.)

See PROHIBITION Pre-trial evidentiary rulings, (p. 422) for discussion of topic.

Pre-trial evidentiary rulings

Naum v. Halbritter, 309 S.E.2d 109 (1983) (Neely, J.)

The Supreme Court noted that in this case, the petitioner, a prosecuting attorney was called to testify before a grand jury. He testified that his only knowledge of Anita McLaughlin was that she was a waitress at a bar he occasionally visited. Approximately one year later he was indicted for false swearing. In rebutting petitioner's claim that he had only passing knowledge of Ms. McLaughlin (an apparent homicide victim) the special prosecutor relied upon statements allegedly made by Ms. McLaughlin to friends and family. The prosecution claimed those statements indicated the petitioner had had intimate relationships with the deceased on at least one occasion. At the time the evidence was offered, the petitioner made a motion *in limine* to foreclose use of the out-of-court statements as hearsay. The respondent judge ruled the statements were admissible as declarations against penal interests. Petitioner sought a writ of prohibition.

Applying the standards set forth in *Hinkle v. Black*, 262 S.E.2d 744 (W.Va. 1979), the Supreme Court found writ of prohibition was an available remedy. The Court found petitioner was not adequately protected by the remedy of appeal since if convicted of false swearing, he would be barred from public office when judgement was entered upon conviction and thus be substantially harmed during the appeal period. The Court found that although they are generally reluctant to reverse an interlocutory evidentiary ruling, this situation required such action. The Court noted that because the State offered no corroborating evidence for its charge, an ultimate ruling by the Supreme Court that the evidence was inadmissible would necessarily lead to reversal of any conviction. Finally, the Court found the petitioner sought the writ in good faith, and that the issue appeared ripe for appellate consideration since it involves a clear legal question. The Court found that a writ of prohibition was an available remedy.

PROHIBITION

Standard for relief

Ash v. Twyman, 324 S.E.2d 138 (1984) (McHugh, C.J.)

"In determining whether to grant a rule to show cause in prohibition when a court is not acting in excess of its jurisdiction, this Court will look to the adequacy of other available remedies such as appeal and to the over-all economy of effort and money among litigants, lawyers, and courts; however, this Court will use prohibition in its discretionary way to correct any substantial, clearcut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts and only in cases where there is high probability that the trial will be completely reversed if the error is not corrected in advance." Syl. pt. 1, *Hinkle v. Black*, 262 S.E.2d 744 (W.Va. 1979).

Petitioner seeks to prohibit prosecution on the charge of driving under the influence as a second offense. The petitioner alleges he entered a guilty plea to his first charge of driving under the influence in 1983 but that prior to the entry of that plea he was not properly advised of his right to counsel, nor did he knowingly and intelligently waive his right to counsel, and that he was never informed of the consequences of his guilty plea with respect to the enhanced sentence for subsequent convictions of the same offense. Petitioner sought a writ of prohibition in the circuit court to prohibit prosecution of the second offense charge. The circuit court refused to issue a rule to show cause and made no findings of fact or conclusions of law. Petitioner asserts there was no testimony taken during the hearing before the circuit court.

The Supreme Court found the important issues before them are whether or not petitioner was represented by counsel during his first conviction and if not, whether or not petitioner knowingly and intelligently waived his right to such representation. The Court found that assuming the truth of petitioners assertion that he was not represented by counsel at the first proceeding, that they had no record before them from any proceeding below upon which to make a reasonable determination as to whether the petitioner was informed of the ramifications of his guilty plea. The Court found those matters may be raised in the case now pending in the magistrate court.

The Court found in the absence of a properly developed record, the petitioner has not demonstrated any right to relief in prohibition.

PROHIBITION

Standing

Myers v. Frazier, 319 S.E.2d 782 (1984) (Miller, J.)

See PLEA BARGAINING In general, (p. 398) for discussion of topic.

PROPORTIONALITY

In general

State v. Cooper, 304 S.E.2d 851 (1983) (Harshbarger, J.)

Applies standard set forth in syl. pt. 8, *State v. Vance*, 262 S.E.2d 423 (W.Va. 1980). (Found in Vol. I under this topic.)

Syl. pt. 5 - Punishment may be constitutionally impermissible, although not cruel or unusual in its method, if it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity, thereby violating West Virginia Constitution, Article III, Section 5 that prohibits a penalty that is not proportionate to the character and degree of an offense.

State v. Buck, 314 S.E.2d 406 (1984) (Miller, J.)

Applies standard set forth in syl. pt. 5, *State v. Cooper*, 304 S.E.2d 851 (W.Va. 1983) found above.

State ex rel. Harless v. Bordenkircher, 315 S.E.2d 643 (1984) (Per Curiam)

Applies standard set forth in syl. pt. 8, *State v. Vance*, 262 S.E.2d 423 (W.Va. 1980) found in Vol. I under this topic.

Appropriateness of the sentence

State v. Buck, 314 S.E.2d 406 (1984) (Miller, J.)

See ROBBERY Sentencing, Review of sentence, (p. 454) for discussion of topic.

Disparate sentences

State v. Cooper, 304 S.E.2d 851 (1983) (Harshbarger, J.)

PROPORTIONALITY

Disparate sentences (continued)

State v. Cooper, (continued)

Disparate sentences of co-defendant's that are similarly situated may be considered in evaluating whether a sentence is so grossly disproportionate to an offense that it violates our constitution.

Disparate sentences are not *per se* unconstitutional. Courts consider factors such as co-defendant's involvement, prior records, rehabilitative potential (conduct, age and maturity) and lack of remorse.

Because the disparate sentences in this case, i.e., appellant, 45 years and co-defendant, one year, was shocking to a sense of justice and was, on its face, grossly disproportionate to appellant's crime, age, and prior record, the case was not decided on principles of disparity.

State v. Buck, 314 S.E.2d 406 (1984) (Miller, J.)

See ROBBERY Sentencing, Review of sentence, (p. 454) for discussion of topic.

Review of sentence

In general

State v. Cooper, 304 S.E.2d 851 (1983) (Harshbarger, J.)

There are two tests to determine whether a sentence is so disproportionate to a crime that it violates West Virginia's Constitution: (1) A subjective test that asks whether the sentence for the particular crime shocks the conscience of the court and society. (If the sentence is so offensive that it cannot pass this test, the inquiry need not proceed further.) (2) When a sentence does not shock the conscience, an objective test is used. That test is set forth in *Wanstreet v. Bordenkircher*, 276 S.E.2d 205 (W.Va. 1981). (Found in Vol. I under this topic.) Appellant's sentence was so offensive to a system of

PROPORTIONALITY

Review of sentence (continued)

In general (continued)

State v. Cooper, (continued)

justice in which proportionality is constitutionally required (*W.Va. Const.*, art. III, § 5) that the *Wanstreet* test was not reached. Appellant had been sentenced to 45 years in the West Virginia Penitentiary. His co-defendant was sentenced to one year in the county jail.

Robbery

State v. Buck, 314 S.E.2d 406 (1984) (Miller, J.)

See ROBBERY Sentencing, Review of sentence, (p. 454) for discussion of topic.

State ex rel. Harless v. Bordenkircher, 315 S.E.2d 643 (1984) (Per Curiam)

See ROBBERY Sentencing, Review of sentence, (p. 457) for discussion of topic.

PROTECTIVE CUSTODY

In general

Bishop v. McCoy, 323 S.E.2d 140 (1984) (McHugh, C. J.)

See PRISON/JAIL CONDITIONS Protective custody, (p. 417) for discussion of topic.

PUBLIC INTOXICATION

In general

State v. Runner, 310 S.E.2d 481 (1983) (McGraw, C.J.)

See PUBLIC INTOXICATION Arrest, Probable cause, (p. 429) for discussion of topic.

Arrest

Probable cause

State v. Runner, 310 S.E.2d 481 (1983) (McGraw, C.J.)

The appellant was convicted of public intoxication. On appeal he alleged the trial court erred by refusing to direct a verdict of acquittal and by refusing to set aside the jury's verdict. The appellant asserted on appeal he was not in a public place at the time of the alleged offense.

The State introduced evidence that a trooper observed a truck with a taillight that was not working. With the intention of issuing a warning citation, the trooper activated his flashing lights, sounded the siren and followed the truck. The driver did not respond to the trooper's signals to stop but continued to the parking lot of the Masonic Lodge. The trooper followed and approached the driver's side of the truck and asked the driver for his license. When the driver could not produce a valid license the trooper asked him to step out of the truck. He did and was arrested.

The trooper directed the appellant, a passenger in the truck, to get out of the truck. The appellant complied and walked around the front of the truck to the drivers side. Upon observing the appellant the trooper concluded he was drunk and arrested him for public intoxication.

Syl. pt. 1 - Appearing in a public place in an intoxicated condition is a criminal offense in West Virginia proscribed by *W.Va. Code* § 60-6-9.

Syl. pt. 2 - Law enforcement officers have the power and duty to arrest and hold in custody, without a warrant, for the purpose of bringing before a magistrate forthwith and without unnecessary delay, any person who in their presence appears in a public place in an intoxicated condition.

State v. Runner, (continued)

The Supreme Court noted that courts in several jurisdictions have recognized that statutes proscribing public intoxication serve two general purposes - they are designed to prevent nuisance and annoyance to members of the general public, and they serve as a protection against offenders who endanger the well-being of themselves or others. The Court noted that in some jurisdictions these purposes are explicitly recognized by statutes which require as an element of the offense of public intoxication the endangerment of self or others, or other conduct constituting an annoyance to others in the vicinity of the offender. Other Courts have recognized these principles without the benefit of express statutory language. The Supreme Court found they recognized these purposes as aims of our statutory law in *State ex rel. Harper v. Zegeer*, 296 S.E.2d 873 (W.Va. 1982). The Court found it is apparent that Code 60-6-9 is designed to protect against public conduct which disturbs the public peace or which endangers the well-being of the offender or others.

The Court found that as with any criminal offense, a warrantless arrest for the offense of public intoxication must be supported by probable cause to be valid. The Court has traditionally recognized that the facts and circumstances necessary to establish probable cause for an arrest for public intoxication may be based on the arresting officer's observations of the offender.

The Supreme Court found that conduct in a passenger in a private conveyance which does not outwardly manifest evidence of intoxication does not present probable cause for an arrest for public intoxication and that the mere act of riding as a passenger in a private vehicle in a socially inoffensive manner is sufficient to sustain a finding of probable cause to arrest for public intoxication.

The Court found that consistent with the dual purpose of our public intoxication statute, the public manifestations of mental or physical incapacity which present probable cause for public intoxication may take the form of conduct which constitutes either an annoyance or nuisance to the

PUBLIC INTOXICATION

Arrest (continued)

Probable cause (continued)

State v. Runner, (continued)

general public, or which would lead a reasonable person to believe that the offender poses a danger to himself or others. Thus, an intoxicated person who is a passenger in a private conveyance on a public highway, and who publicly manifests his intoxication by offensive conduct, is subject to arrest for public intoxication, as well as the offender who endangers the public safety, or who invites public attention by giving the appearance of being in distress and in need of possible assistance.

The Court found that the conduct of the appellant while a passenger in the truck was sufficient to constitute probable cause for arrest for public intoxication. The Court found the arresting officer recited no facts or circumstances in his testimony from which a prudent person could form a belief that the appellant was intoxicated while inside the truck. The prosecution could not rely on the appellant's conduct after he exited the truck to show he was intoxicated while a passenger in a private vehicle on a public road.

The Court concluded that because there were no public manifestations of evidence upon which to base probable cause for public intoxication, the appellant's arrest was unlawful and his conviction was reversed.

Incarceration of alcoholics

State ex rel. Harper v. Zegeer, 296 S.E.2d 873 (1982) (Harshbarger, J.) (Addendum on rehearing)

In *State ex rel. Harper v. Zegeer*, 296 S.E.2d 873 (W.Va. 1982), the Supreme Court recognized that chronic alcoholism is a disease and held that criminal punishment of alcoholics for public intoxication constitutes cruel and unusual punishment in violation of article three, section five of the West Virginia Constitution. The Court delayed the effective date of the ruling until July 1, 1983. Following the death of a nineteen year old youth, who committed suicide while being jailed on a public intoxication charge, the petitioner in *Harper* moved the court, in a petition for rehearing, to clarify the original opinion in certain respects.

Incarceration of alcoholics (continued)

State ex rel. Harper v. Zegeer, (continued)

The Supreme Court found that it had not declared Code 60-6-9 (1977 Replacement Vol.) to be unconstitutional and that when a law enforcement officer perceives a violation of this statute, he has a duty to see that the law is "faithfully executed."

The Court found the law in West Virginia provides law enforcement officials two procedural options when they encounter a person they believe to be in violation of West Virginia Code 60-6-9. They may issue a citation as provided in Code 62-1-5(a) (1982 Cum Supp.) and the individual must then appear before a magistrate within a specified time. However, if the officer believes that accused lacks the capacity to conduct his or her own affairs, and no other individual is willing to undertake responsibility for the violator, or if the officer "has reasonable cause to believe that the person is likely to cause serious harm to himself or others," Code 27-1-4, the person may be arrested.

Syl. pt. 1 - Presentment before a judicial officer before incarceration on a criminal charge is basic to due process.

Also recognize in our organic law is the requirement of probable cause prior to the seizure of persons.

Syl. pt. 2 - It is the law of West Virginia that no person may be imprisoned or incarcerated prior to presentment before a judicial officer and the issuance of a proper commitment order.

In addition to the probable cause determination, other vital due process purposes are served by the prompt presentment requirement. At the preliminary appearance before a magistrate, the defendant is informed of his right against self-incrimination, his right to counsel, the nature of the complaint against him, his right to a preliminary hearing if the offense is to be presented for indictment, and the defendant must be provided the opportunity to communicate with an attorney or with another person for the purpose of obtaining counsel or arranging bail.

PUBLIC INTOXICATION

Incarceration of alcoholics (continued)

State ex rel. Harper v. Zegeer, (continued)

The judicial officer may release the charged individual on his own recognizance or other bond upon a determination that the accused possesses the necessary rational capability to conduct his own affairs. Alternatively, the judicial officer may release the individual into custody of a responsible who agrees to be responsible for the accused's actions. However, if it is determined that the accused is an "inebriate", defined by statute as "anyone over the age of eighteen years who is incapable or unfit to properly conduct himself or herself, or his or her affairs, or is dangerous to himself or herself or others, by reason of drunkenness . . ." *W.Va. Code* 27-1-4, an alternative disposition must be made under the applicable mental health statutes.

If the arresting officer has knowledge that the accused has a previous history of arrest for public intoxication, he has a duty under Code 60-6-9 to bring these facts to the attention of the judicial officer, or to make application for involuntary hospitalization for examination of an accused who, because of his inebriated state, is likely to harm himself or others if allowed to remain at liberty.

Upon such application, or upon his own authority, the judicial officer may order that the defendant be remanded to the custody of the nearest county or regional mental facility approved by the state, or a state-operated mental health facility. Such order must be based on a finding that the accused, because of his own intoxicated condition or other relevant factors, constitutes a danger to himself or others. Commitment to such a facility may extend fir no more than 24 hours without a judicial determination of the need for further detention. The county jailer, who may be a deputy sheriff is responsible for transporting such individuals "to and from the place of hearing and the mental health facility." Code 27-5-1(d). See also Code 7-8-2, -4. The arresting officer is not authorized by law to provide transportation to or from the mental health facility where the inebriated is to be detoxified.

Syl. pt. 3 - The legislature has clearly demonstrated by enactment of the mental health laws that it does not contemplate the inebriated persons, as defined by law, should be detained in jails or lockups.

PUBLIC INTOXICATION

Incarceration of alcoholics (continued)

State ex rel. Harper v. Zegeer, (continued)

Syl. pt. 4 - The legislature has specified detailed procedures for dealing with alcohol related problems and has directed the Department of Health and its division of Mental Health to execute those procedures.

Once an individual has been placed in custody of a mental health facility via a temporary commitment order, the facilities personnel must provide the necessary care and observation until the person receives the full use of his faculties. If within the 24 hour commitment period, the person recovers the use of his faculties, he may be released from the custody of Mental Health and returned to a judicial officer who must inform him of his rights and release him on bail.

The individual remains charged with the crime of public intoxication. The charge must be disposed of through legal proceedings. At this stage of the proceedings, the holding in *Harper* that chronic alcoholics may not be imprisoned for the offense of public intoxication becomes operative. The legislature has defined an alcoholic as "any person who chronically and habitually uses alcoholic beverages to the extent that he loses the power of self-control as to the use of such beverages, or, while chronically and habitually under the influence of alcoholic beverages, endangers public morals, health, safety or welfare." *W.Va. Code* § 16-1-10 (19) (a).

Syl. pt 5 - Chronic alcoholism is a defense to a charge of public intoxication, Upon a showing that an accused is a chronic alcoholic, he is to be accorded all of the procedural safeguards that surround those with mental disabilities who are accused of crime.

Syl. pt. 6 - A finding of chronic alcoholism is to be treated as proof of addiction as required by *W.Va. Code* § 27-6A-5.

Therefore the defendant may be hospitalized for up to 40 days for observation and examination. *Id*. Civil commitment proceedings may be initiated during this period.

The situation may arise when a person suspected of being an alcoholic pleads guilty to the charge of public intoxication. In such cases, the prosecutor has

Incarceration of alcoholics (continued)

State ex rel. Harper v. Zegeer, (continued)

a duty to offer all known evidence which proves or disapproves the accused's addiction to alcohol. The judicial officer attending the proceeding may render verdicts of guilty or not guilty by reason of alcoholism. If the person is found not guilty by reason of alcoholism, he may be committed as discussed above. A verdict of guilty should result in treatment of the accused as provided by law.

The Court concluded that in outlining the procedures which currently exist, they did not intend to suggest that they are convenient, adequate, efficient, or that they meet the standards set forth in the initial opinion. The procedures outlined are minimum statutory requirements now mandated by the Legislature. The Court found need to be streamlined to produce more coordinated procedures and a more easily administered program.

McGraw v. Hansbarger, 301 S.E.2d 848 (1983) (McGraw, C. J.)

Syl. pt. 1 - The Director of the Department of health has an affirmative duty to provide a comprehensive program for the acre, treatment and rehabilitation of alcoholics.

Syl. pt. 2 - The department of Health is required to accept all alcoholics who are involuntarily committed.

Syl. pt. 3 - When a judicial officer issues an order remanding a defendant to the custody of the Department of Health as a danger to himself or others, the department has a duty to see that the defendant is placed forthwith in an appropriate mental health facility.

Syl. pt. 4 - "it is the obligation of the State to provide the resources necessary to accord inmates of State mental institutions the rights which the state has granted them under [*W.Va. Code* § 27-5-9]." Syllabus point 3, *E.H. v. Matin*, 284 S.E.2d 232 (W.Va. 1981).

Syl. pt. 5 - Inpatient services are an essential element of care which community mental health centers are required to provide within the center or an a written contractual basis with another facility. Community mental health

Incarceration of alcoholics (continued)

McGraw v. Hansbarger, (continued)

centers are the facility of first choice fro the examination of involuntarily committed patients. If not available locally, examination may be performed by referral to other appropriate facilities, but published procedures must be in effect to insure the smooth and expeditious referral of patients.

Syl. pt. 6 - *W.Va. Code* § 60-3-9c has dictated profits accruing from the sale of alcoholic liquors for the care, treatment and rehabilitation of alcoholics.

Syl. pt. 7 - Where a special fund is created or set aside by statute for a particular purpose or use, it must be administered and expended in accordance with the statute, and may be applied only to the purpose for which it was created or set aside, and not diverted to any other purpose or transferred from such authorized fund to any other fund.

Syl. pt. 8 - "Funds derived . . .for a particular purpose shall be expended for the purpose and for no other . . . and where such funds have been diverted through error, mandamus will lie, on a proper showing, to restore the funds to the purpose for which levied, and to correct the error." Syllabus, in part, *State ex rel. Cook v. Lawson*, 110 W.Va. 258, 157 S.E. 589 (1931).

Syl. pt. 9 - The dedicated revenue collected pursuant to *W.Va. Code* § 60-3-9c is constitutionally impressed with the nature of a trust which prohibits the expenditure of such dedicated revenue for any purpose other than the care, treatment and rehabilitation of alcoholics.

Syl. pt. 10 - Once the budget becomes law, it is the governor's duty to see that it is faithfully executed.

Syl. pt. 11 - The Director of the Department of Health has the duty to see the admission of all persons for detoxification services at community health centers without regard to their ability to pay for such services.

PUBLIC TRIAL

In general

State v. Richey, 298 S.E.2d 879 (1982) (Miller, C.J.)

See DENIAL OF A FAIR TRIAL Right to public trial, (p. 104) for discussion of topic

Balance right to public trial and right to fair trial

State v. Franklin, 327 S.E.2d 449 (1985) (Neely, C.J.)

See DRUNK DRIVING Denial of fair trial, Presence and activities of MADD members, (p. 140) for discussion of topic.

RECEIVING STOLEN GOODS

Double jeopardy

State v. Hall, 298 S.E.2d 246 (1982) (McHugh, J.)

See RECEIVING STOLEN GOODS Sufficiency of evidence, (p. 440) for discussion of topic.

Elements of the offense

State v. Hall, 298 S.E.2d 246 (1982) (McHugh, J.)

Applies standard set forth in *State v. McGraw*, 140 W.Va. 547, 85 S.E.2d 849 (1955). (See *State v. Frazier*, 253 S.E.2d 534 (W.Va. 1979). (Found in Vol. I under this topic.)

The foregoing elements may be established by circumstantial evidence, as well as by direct evidence. *State v. Mounts*, 120 W.Va. 661, 200 S.E. 53 (1938).

The first element of the offense requires that the property be stolen by some person other than the defendant. This is to prevent a person who is charged with theft of the property from also being charged with concealing it as well, *Milanovich v. United States*, 365 U.S. 551 (1961). Because the appellant was not charged with the thefts of the property, nor was any evidence offered at trial which linked the appellant to the thefts, the Supreme Court found it was implicit that the property was stolen by someone else.

The second element requires that the appellant must have aided in concealing the property. The State introduced evidence that the farm where the stolen property was found was occupied by the appellant and that the appellant was seen using numerous items of the stolen property prior to the search of the farm.

The Supreme Court found that it is not required that it be shown that the appellant received the stolen items, but rather that he aided in the concealment of the stolen property.

It is not always necessary to physically hide stole property before a person may be said to conceal it. It is just as much of a concealment if someone hinders the return of the property to its rightful owner. Here, the Court found

Elements of the offense (continued)

State v. Hall, (continued)

it was apparent the appellant did not disclose the whereabouts of the stolen property to the proper authorities, nor did the appellant make any other inquiry concerning the stolen property which was later found on his property.

The final two elements require that the appellant must have known, or had reason to believe, that the property was stolen and the concealment was done with a dishonest purpose.

In most cases, there is no direct testimony of the receivers actual belief. Proof thereof must therefore be inferred from the circumstances surrounding the receipt of the stolen property. His . . . possession of recently stolen property, if unexplained or falsely explained, justifies the inference that he received it with guilty knowledge. . . W. LaFave & A. Scott *Handbook on Criminal Law* § 93, at 686 (1972).

The Supreme court found that a rational person would make a diligent effort to inquire how the dozens of stolen items appeared on his property. At the very least, a prudent person would contact the local authorities concerning the otherwise unexplained appearance of large numbers of diverse items on his property. Here, the appellant made no such contact. Viewing the circumstances as a whole, the jury had sufficient evidence to warrant the inference that the appellant did in fact have a "reason to believe" the items he aided in concealing were stolen and did so with guilty knowledge.

The evidence offered at trial created more than a mere suspicion and was sufficient to "convince impartial minds of the guilt" of the appellant.

Violation of Code 61-3-18 is punishable as one larceny. *State v. Hall*, 298 S.E.2d 246 (W.Va. 1982); *State v. Winston*, 295 S.E.2d 246 (W.Va. 1982); *State v. Buck*, 294 S.E.2d 281 (W.Va. 1982).

Thus, resentencing was appropriate when defendant was convicted of receiving and of aiding in concealing stolen property and was sentenced for each conviction. Two separate trials were involved. In the first instance defendant had harbored stolen truck parts in a leased garage. In the second instance, defendant was caught driving a vehicle, parts of which had come from a stolen truck.

RECEIVING STOLEN GOODS

Elements of the offense (continued)

State v. Oldaker, 304 S.E.2d 843 (1983) (Harshbarger, J.)

Anyone receiving stolen property who has made no effort to return it is chargeable with concealment.

Syl. pt. 7 - Receiving or aiding in concealing a stolen item is the same offense for purposes of punishment, and it is incorrect to charge receiving stolen property in one count and concealing it in another for the same item of property.

Failure to charge receiving or aiding in concealing stolen goods in one count is not reversible error, but two convictions and sentences for the same offense violates defendant's constitutional protection against multiple punishments. *W.Va. Const.*, art. III, § 5; *State v. Pancake*, 296 S.E.2d 37 (W.Va. 1982).

State v. Watts, 309 S.E.2d 101 (1983) (Per Curiam)

Applies standard set forth in *State v. McGraw*, 140 W.Va. 547, 85 S.E.2d 849 (1955). (See *State v. Frazier*, 253 S.E.2d 534 (W.Va. 1979). (Found in Vol. I under this topic.)

Sufficiency of evidence

State v. Hall, 298 S.E.2d 246 (1982) (McHugh, J.)

The appellant was convicted and sentenced on 15 separate counts of receiving and aiding in the concealment of stolen property. The appellant contended that sentencing him to multiple prison terms was violative of the constitutional ban on double jeopardy.

The Supreme Court found that it is well established that "the stealing of property from different owners at the same time and the same place constitute but one larceny." Annot., 37 ALR 3d 1407 (1971). The rationale is that such a taking is but one offense because the act is one continuous act - the same transaction.

Sufficiency of evidence (continued)

State v. Hall, (continued)

The rationale behind the "single larceny doctrine" has also been applied to the crime of receiving stolen property.

Here, the Supreme Court found that the prosecution offered no evidence concerning separate occasions when the appellant may have received the stolen property. The evidence showed only that the stolen property was concealed on appellant's farm. Thus, under the facts presented there was but a single offense of larceny by aiding in the concealment of stolen property supported by the evidence. The State failed to show that the appellant committed separate offenses under the statute. Because only one offense was proven, only one conviction and one sentence are warranted. Therefore, the trial court erred in imposing multiple sentences upon the appellant. The Court noted in a footnote that it was not necessary to discuss in detail the constitutional question concerning double jeopardy as it relates to multiple sentences. Instead, they resolved the issue by relying on the failure of proof by the prosecution of more than one offense.

The case was remanded for resentencing.

See RECEIVING STOLEN GOODS Elements of the offense, (p. 438) for discussion of topic.

State v. Watts, 309 S.E.2d 101 (1983) (Per Curiam)

Here, the appellant was convicted of grand larceny by receiving or aiding in the concealment of stolen goods. The evidence indicated that on January 20, 1980, fourteen locomotive radiators worth several thousand dollars were stolen from the C & O Railway company's property in Cabell County. These radiators were taken to a junk yard. Based on a tip, a local police detective observed the radiators at the junk yard and noted a copper plate on one of them bearing the word "railroad." The detective and a C & O Railway detective later went to the junk yard and observed a van with a flat tire traveling at a relatively high rate of speed. The van was pulled over and the driver of the van was issued a citation for driving without a operators license. The appellant, a passenger in the van, was arrested for public intoxication. The radiators were in plain view in the van.

RECEIVING STOLE GOODS

Sufficiency of evidence (continued)

State v. Watts, (continued)

The Supreme Court found that the extent of the State's case was that the appellant was a passenger in the van in which recently stolen radiators were being transported. The Court found there was no evidence that the appellant bought or received the property form another person, the State did not prove that the appellant owned the van or that he helped load the radiators in the van, and did not call as a witness the driver of the van. The Court found the appellant's presence in the van was not sufficient, standing alone, to show dominion, control or possession of the property or to prove his guilty knowledge.

The Supreme Court found the State failed to prove appellant guilty of the crime for which he was convicted and vacated and remanded for the entry of a judgement of acquittal as required by Rule 29 of the Rules of Criminal Procedure.

Value of stolen property

State v. Hall, 298 S.E.2d 246 (1982) (McHugh, J.)

See EVIDENCE Value of stolen property, (p. 197) for discussion of topic.

RECIDIVIST

Conviction returned at same time

Turner v. Holland, 327 S.E.2d 388 (1985) (Miller, J.)

Realtor was convicted of sexual abuse and burglary, both offenses arising from the same event. The sentences were set consecutively. The circuit court added five year enhancements to each sentence. Relator contends that under *W.Va. Code* 61-11-18, the circuit court could have imposed only one five year enhancement.

The Court found the purpose of the recidivist statute is to deter those who have been convicted of felonies from committing subsequent offenses. The Court found they have held that before any prior conviction can be used to enhance a present conviction, it must be shown that the prior felony was committed and a conviction obtained on it prior to the time of the present felony offense. Where two convictions are obtained against the defendant on the same day, they are treated as one conviction and neither can be used to enhance the other under the W.Va. recidivist statute. The Court also noted that multiple convictions on the same day are treated as one conviction for purpose of enhancing any subsequent felony convictions.

The Court held in this case that the three convictions obtained in the same proceeding must be treated as one for purposes of any recidivist enhancement and that therefore, a five year enhancement based on the prior felony conviction should only be imposed on one of the present sentences.

Syl. - In the absence of some express language in our recidivist statute, *W.Va. Code* 61-11-18, authorizing criminal convictions returned against the defendant at the same time to be separately enhanced by a prior felony, it may not be done and only one enhancement is permissible.

The Court directed the circuit court to vacate one of the enhancements.

Enhanced sentence on retrial

State ex rel. Young v. Morgan, 317 S.E.2d 812 (1984) (Miller, J.)

Petitioner was convicted of second degree murder. Upon a jury finding that he has previously been convicted of a felony, a five year sentence was added to the maximum term for second degree murder. The conviction was set

RECIDIVIST

Enhanced sentence on retrial (continued)

State ex rel. Young v. Morgan, (continued)

aside by a federal district court upon petitioner's application for habeas corpus relief. He was retried, convicted of first degree murder without a recommendation of mercy, and sentenced on that verdict. In light of the verdict, the prosecutor did not file a new recidivist information. The first degree murder conviction was vacated on appeal and the Supreme Court ordered a sentence for second degree murder be imposed on remand. Prior to the resentencing, the prosecutor filed an information seeking an enhanced sentence. Petitioner moved to dismiss the information claiming it was improper since not filed during the same term of court in which he was sentenced for first degree murder. The trial court denied the motion.

The Supreme Court found no merit in respondent's argument that the recidivist penalty survived the setting aside of the second degree murder conviction by the federal district court. The Court, however, found the State complied with the habitual offender statute by filing an information prior to the resentencing hearing.

Syl. pt. 2 - When a defendant who has been convicted of second degree murder and has had a five year enhancement of his sentence imposed under the recidivist statutes, *W.Va. Code*, 61-11-18 and 19, and who appeals his conviction, which is subsequently reversed, his recidivist conviction is also vacated. However, this does not foreclose the State from seeking another recidivist enhancement after retrial, even though there has been imposed an erroneous sentence at the retrial. The recidivist proceedings must be initiated prior to the time that the correct sentence is imposed.

The Court found the rationale for this rule to be the defendant at resentencing stands basically in the same position as he was prior to his initial appeal.

RECKLESS DRIVING

Sufficiency of the evidence

State v. Jarvis, 310 S.E.2d 467 (1983) (Harshbarger, J.)

The appellant was convicted of reckless driving. On appeal he alleged that the trial court should have granted a judgement of acquittal on this charge. Two troopers observed the appellant pass several cars in a straight stretch and two or three cars in a no-passing zone and in a totally blind curve. There was no berm on the left-hand side of the road on this highway.

The Supreme Court found there was ample evidence from which the jury could reasonably conclude the appellant was acting in willful, wanton disregard fort he safety of others.

RETROACTIVITY

In general

State v. Mullins, 301 S.E.2d 173 (1982) (Per Curiam)

Applies standard set forth in syl. pt. 3, *State v. Gangwer*, 283 S.E.2d 839 (W.Va. 1981). (Found in Vol. I under this topic.)

State v. Kopa, 311 S.E.2d 412 (1983) (McHugh, J.)

See case for extensive discussion on retroactivity.

Alibi

State v. Kopa, 311 S.E.2d 412 (1983) (McHugh, J.)

See DEFENSES Alibi, (p. 87) for discussion of topic.

See case for extensive discussion on retroactivity and retroactivity with regard to alibi instructions.

Burden shifting

State v. Kopa, 311 S.E.2d 412 (1983) (McHugh, J.)

See DEFENSES Alibi, (p. 87) for discussion of topic.

In camera hearing on evidence of flight

State v. Richey, 298 S.E.2d 879 (1982) (Miller, C.J.)

See EVIDENCE Flight, (p. 164) for discussion of topic.

RIGHT TO COUNSEL

In general

State v. Gravely, 299 S.E.2d 375 (1982) (McHugh, J.)

See RIGHT TO COUNSEL Pre-trial identification, (p. 448) for discussion of topic.

State v. Sheppard, 310 S.E.2d 173 (1983) (McGraw, C.J.)

See IDENTIFICATION Suggestive information, Denial of right to counsel, (p. 245) for discussion of topic.

Dissatisfaction/rejection of appointed counsel

State v. Sheppard, 310 S.E.2d 173 (1983) (McGraw, C.J.)

See INDIGENTS Right to counsel, Dissatisfaction/rejection of appointed counsel, (p. 265) for discussion of topic.

State v. Bogard, 312 S.E.2d 782 (1984) (Per Curiam)

See INDIGENTS Right to counsel, Dissatisfaction/rejection of appointed counsel, (p. 267) for discussion of topic.

Preliminary hearing

See PRELIMINARY HEARING Right to counsel, (p. 409) for discussion of topic.

Pre-trial court-ordered psychiatric interview

State v. Jackson, 298 S.E.2d 866 (1982) (Harshbarger, J.)

See SELF-INCRIMINATION - STATEMENTS BY DEFENDANT Statements to court-appointed psychiatrist, (p. 490) for discussion of topic.

RIGHT TO COUNSEL

Pre-trial identification

State v. Gravely, 299 S.E.2d 375 (1982) (McHugh, J.)

Syl. pt. 1 - An adversary judicial criminal proceeding is instituted against a defendant where the defendant after his arrest is taken before a magistrate pursuant to *W.Va. Code*, 62-1-5 [1965], and is, *inter alia*, informed pursuant to *W.Va. Code*, 62-1-6 [1965], of the complaint against him and of his right to counsel. Furthermore, where the defendant at that magistrate proceeding expresses a desire to be represented by counsel, a subsequent pretrial identification of the defendant at a police initiated line-up or one-on-one police initiated confrontation between the defendant and a witness or crime victim, without notice to and in the absence of defense counsel, constitutes violation of the defendant's right to counsel under the Sixth Amendment to the Constitution of the United States and under art. III, § 14, of the Constitution of West Virginia, so as to prejudice any trial testimony in regard to the identification procedure.

The Supreme Court concluded that the police initiated identification of the appellant by the victim violated the appellant's right to counsel.

State v. Audia, 301 S.E.2d 199 (1983) (McHugh, J.)

See IDENTIFICATION Suggestive identification, Denial of right to counsel, (p. 245) for discussion of topic.

State v. Sheppard, 310 S.E.2d 173 (1983) (McGraw, C.J.)

Applies standard set froth in syl. pt. 1, *State v. Gravely*, 299 S.E.2d 375 (W.Va. 1982) cited above.

Right to effective assistance

State ex rel. M.S.B. v. LeMaster, 313 S.E.2d 453 (1984) (Neely, J.)

See JUVENILE Right to counsel, Right to effective assistance, (p. 356) for discussion of topic.

RIGHT TO COUNSEL

Statements induced by police

See SELF-INCRIMINATION - STATEMENTS BY DEFENDANT Voluntariness, Right to counsel, (p. 514) for discussion of topic.

Waiver of

State v. Jackson, 298 S.E.2d 866 (1982) (Harshbarger, J.)

See SELF-INCRIMINATION - STATEMENTS BY DEFENDANT Statements to court-appointed psychiatrist, (p. 490) for discussion of topic.

State v. Easter, 305 S.E.2d 294 (1983) (Per Curiam)

Applies standard set forth in syl. pt. 2, *State v. Bradley*, 255 S.E.2d 356 (W.Va. 1979). (Found in Vol. I under this topic.)

State v. Sheppard, 310 S.E.2d 173 (1983) (McGraw, C.J.)

See SELF-REPRESENTATION In general, (p. 538) for discussion of topic.

State v. Wyer, 320 S.E.2d 92 (1984) (Miller, J.)

See SELF-INCRIMINATION - STATEMENTS BT DEFENDANT Voluntariness, Right to counsel, (p. 519) for discussion of topic.

RIGHT TO JURY TRIAL

Municipal court

State v. McGhee, 324 S.E.2d 710 (1984) (Harshbarger, J.)

See MUNICIPAL COURT Right to jury trial, (p. 387) for discussion of topic.

ROBBERY

Accessory, aiding and abetting, principal

See ACCESSORY, AIDING AND ABETTING, PRINCIPAL Indictment, (p. 20) for discussion of topic.

Aggravated robbery

Intent to steal

State v. Breeden, 329 S.E.2d 71 (1985) (Per Curiam)

Appellant was convicted of aggravated robbery. He contends the verdict was not supported by evidence.

The Court found the facts showed Mr. And Mrs. Haynes were seated in their car in a school parking lot. Appellant and another approached the car, and appellant leaned against the car on the drivers side. When Mr. Haynes told him to move, the appellant began cursing, reached through the open car window, grabbed Mr. Haynes' wristwatch and tore it from his arm. The appellant dropped the watch and the pulled Mr. Haynes' shirt over his head and struck him in the face. After more of a scuffle, a police officer arrived. Mr. Haynes told him what happened and gave him the wristwatch which he had found laying on the ground approximately two feet from the spot where the appellant had first approached the car.

Syl. pt. 1 - "The *animus furandi*, or the intent to steal or to feloniously deprive the owner permanently of his property, is an essential element in the crime of robbery." Syllabus point 2, *State v. Hudson*, 157 W.Va. 939, 206 S.E.2d 415 (1974).

The Supreme Court found the state produced no evidence, direct or circumstantial, of the appellant's intent to permanently deprive Mr. Haynes of his wristwatch. Viewing the essentially undisputed facts of this case in the light most favorable to the prosecution, the Court was convinced the evidence of intent to steal manifestly inadequate to support the conviction and that an injustice had occurred in this case. The Court found retrial of the appellant on any charge in which such intent is an essential element of the offense is barred by double jeopardy. The Court found the conviction should be vacated and the appellant should be properly indicted.

ROBBERY

Elements

In general

State v. Neider, 295 S.E.2d 902 (1982) (Miller, C.J.)

Applies standard set forth in syl. pts. 1 and 2, *State v. Harless*, 285 S.E.2d 461 (W.Va. 1981). (Found in Vol. I under this topic.)

The Supreme Court has recognized that our robbery statutes must be read in conjunction with the common law elements of larceny.

It is clear that robbery at common law encompassed the same elements as a larceny and included two additional elements; the taking has to be from the person of another or in his presence and such taking has to be force or putting the person in fear.

Indictment

State v. Beckett, 310 S.E.2d 883 (1983) (Miller, J.)

The appellant was convicted of aggravated robbery. On appeal he challenged the form of the indictment, contending the indictment actually charged only unaggravated robbery. The Supreme Court noted a similar indictment form was analyzed and upheld as properly charging aggravated robbery in syl. pt. *State v. Cunningham*, 236 S.E.2d 459 (W.Va. 1977).

Instructions

Lesser included offense

State v. Neider, 295 S.E.2d 902 (1982) (Miller, J.)

See LESSER INCLUDED OFFENSE In general, (p. 374); ROBBERY Elements, In general, (p. 452) for discussion of topic.

Instructions (continued)

Lesser included offense (continued)

State v. Neider, (continued)

Here, under the factual test, for the defendant to have been entitled to an instruction on larceny as a lesser included offense of robbery, it was essential for her to have contested the distinguishing elements. There was no evidence disputing the fact that the defendant took money from the victim by presenting a deadly weapon and thereby placing him in fear of bodily injury. The trial court therefore did not err in refusing to give the lesser included offense instruction offered by defense counsel.

Syl. pt. 5 - Under the legal test set out in syl. pt. 1 of *State v. Louk*, 285 S.E.2d 432 (W.Va. 1981), larceny is a lesser included offense of robbery.

Sentencing

State v. Cooper, 304 S.E.2d 851 (1983) (Harshbarger, J.)

Robbery by violence is punished by a minimum determinate 10-year sentence, but a trial court had broad discretion to impose any determinate from 10 years to life. *W.Va. Code*, 61-2-12.

Review of sentence

State v. Cooper, 304 S.E.2d 851 (1983) (Harshbarger, J.)

Appellant and a co-defendant were involved in a robbery and beating incident on August 31, 1980. On September 5, the two men tried to use stolen credit cards to get cash in a Charleston bank but were apprehended by off-duty policemen. Upon being arrested and taken to police headquarters, the co-defendant confessed and implicated appellant. Before appellant was taken to the magistrate, he was informed of his co-defendant's confession. Appellant then gave his confession. Appellant and co-defendant were indicted. Appellant plead not guilty; his co-defendant pled guilty to petit larceny and was sentenced to one year in the county jail.

Sentencing (continued)

Review of sentence (continued)

State v. Cooper, (continued)

Appellant, 19 years old, was convicted of robbery by violence, *W.Va. Code*, § 61-2-12, and was sentenced to 45 years in the West Virginia Penitentiary. He challenged the length of the sentence as violative of the West Virginia Constitution principle of proportionality. The Supreme Court found this to affront its sensibilities and to ignore proportionality principles.

"A trial judge's discretion, while very broad in sentencing for robbery, must be tempered by *W.Va. Const.* art. III, § 5, *supra*, requiring sentences to be proportional to the character and degree of the offense." Appellant's pre-sentence report indicated that appellant was nineteen, no weapon was used, the victim was not seriously injured, appellant had no prior arrest record (only for public intoxication), he was not a high school graduate, and he lived in the streets.

This information was not, according to the Supreme Court, compatible with the trial judge's finding that appellant associated with hardened criminals, that he has made a way of life of crime, or that he had a heart fatally bent on mischief.

See *State v. Houston*, 273 S.E.2d 375 (W.Va. 1980), (found in Vol. I under this topic) for discussion of guidelines for the factual record needed to support imposition of a robbery sentence.

State v. Buck, 314 S.E.2d 406 (1984) (Miller, J.)

The appellant was convicted of aggravated robbery and sentenced to 75 years. A co-defendant pleaded guilty to grand larceny and was sentenced to one year in jail. In appellant's first appeal, the Court remanded for reconsideration of the sentence in a manner consistent with the principles articulated in *State v. Houston*, 273 S.E.2d 375 (W.Va. 1980) and *Smoot v. McKenzie*, 277 S.E.2d 624 (W.Va. 1981) and for development of appropriate sentencing record *State v. Buck*, 294 S.E.2d 281 (W.Va. 1982). The trial court reaffirmed the original sentence despite the Supreme Court's intimations that the sentence be reduced.

Sentencing (continued)

Review of sentence (continued)

State v. Buck, (continued)

The appellant contends his sentence was unconstitutionally disproportionate to his offense and was grossly disparate to the one year sentence given to his co-defendant.

In determining whether the sentence is disproportionate, the Court considered the record which indicated the appellant was twenty-three when sentenced, this was his first conviction as an adult, his first prosecution for a crime of violence, the appellant expressed remorse and stated that he would like to make restitution. The Court also considered the sentence that can be imposed in W.Va. if convicted of related offenses. The Court noted that if the appellant had killed the victim, he might have received a lesser confinement if convicted of first degree with mercy. The Court also noted the maximum sentence for second degree murder and voluntary manslaughter are less than one third as long as the sentence he received.

The Supreme Court found they should also consider the punishment that would be available in other States for the same offense. In this regard, they found the appellant's sentence is substantially longer than the maximum permissible sentence for aggravated robbery in a majority of jurisdictions.

The Court also found the fact that the co-defendant received a much lighter sentence was also relevant, and that this case raised the question of disparity of sentences discussed in *Smoot.* The Court compared the appellant's prior record as a juvenile and adult with the prior records of the co-defendant.

The trial court justified the sentence because of the appellant's juvenile record because the appellant had planned and instigated the robbery and struck the victim several times with a tire iron, from which the court concluded he had intended to kill the victim, and because appellant had received a negative presentence diagnostic evaluation. The trial court explained the disparity in sentences was based upon his belief that the appellant had threatened to kill co-defendant, which led the trial court to conclude that it would be unsafe to sentence them both to the penitentiary.

Sentencing (continued)

Review of sentence (continued)

State v. Buck, (continued)

The Supreme Court did not believe that any of the trial court's reasons, individually or combined, could justify a seventy-five year sentence. The Court found the appellant's prior juvenile record, devoid of any conviction of a crime of violence, could not be accorded substantial weight in the sentencing process. They noted in footnote 6 that no issue was raised as to whether Code 49-5-17 (1978) limits such consideration. The Court noted that none of the appellant's prior offenses involved violence to the person and that this was his first adult conviction.

The Supreme Court did not doubt that the appellant instigated the robbery and struck the victim, but did not agree that the trial court could conclude that he intended to murder the victim. The Court found the presentence diagnostic report was not entirely negative, and that the disparity in sentences could not be justified on the basis of threats made by appellant against the co-defendant.

The Supreme Court concluded the appellant's sentence was disparate and violated our constitutional provision which requires penalties to be proportioned to the character and degree of the offense. The Court declined appellant's invitation to hold they have the power to set a reduced sentence for him and instead remanded for reconsideration of the sentence under the guidelines in this opinion. The Court concluded the involved circuit judge should not preside upon the resentencing and they would designate another circuit judge to handle the resentencing.

Syl. pt. 2 - Disparate sentences for co-defendant's are not *per se* unconstitutional. Courts consider many factors such as each co-defendant's respective involvement in the criminal transaction (including who was the prime mover), prior records, rehabilitative potential (including post-arrest conduct, age and maturity), and lack of remorse. If co-defendant's are similarly situated, some courts will reverse on disparity of sentence alone.

ROBBERY

Sentencing (continued)

Review of sentence (continued)

State ex rel. Harless v. Bordenkircher, 315 S.E.2d 643 (1984) (Per Curiam)

The appellant was convicted of aggravated robbery and was sentenced to a term of one hundred twenty years in the state penitentiary.

The Supreme Court found they had held in *State v. Houston*, 273 S.E.2d 375 (W.Va. 1980) that in instances such as aggravated robbery where a judge has broad leeway to set a determinate sentence and there is no statutory maximum limit, a sentencing record must be made in order to determine the appropriateness of the sentence given.

Here, the trial judge dispensed with the presentence report since he had previous encounters with the appellant and was familiar with him and had knowledge of the appellant's background. The judge did not detail in the record the factors upon which he relied in imposing the lengthy sentence.

The Supreme Court did not find the trial judge erred in dispensing with the presentence report under Rule 32 of the W.Va. Rules of Criminal Procedure and in relying on his own knowledge of the appellant's background in imposing sentence, but they did find the judge should have articulated that knowledge on the record in order to provide the opportunity for meaningful appellate review.

Sufficiency of evidence

State v. Beckett, 310 S.E.2d 883 (1983) (Miller, J.)

The appellant was convicted of aggravated robbery. He alleged the evidence was sufficient to justify his conviction. The Supreme Court found the jury was presented with enough evidence on which to base its decision.

SEARCH AND SEIZURE

By conservation officer

State v. Boggess, 309 S.E.2d 118 (1983) (McHugh, J.)

See CONTROLLED SUBSTANCES Possession with intent to manufacture or deliver, (p. 81) for discussion of topic.

By private citizen

State v. Oldaker, 304 S.E.2d 843 (1983) (Harshbarger, J.)

Syl. pt. 1 - Unites States Constitution, Amendment IV, and West Virginia constitution, Article III, § 6, do not apply to searches by private individuals unless they are acting as instruments or agents of the State.

In this case officers refused to search a rented garage without a warrant even though the landlord gave consent. Upon the officer's refusal, the landlord suggested that he look inside. The trial court determined that the landlord acted independently, not as an agent of the State. According to the Supreme Court, that finding was not plainly wrong, evidence seized pursuant to a valid warrant obtained after the landlord described his findings was, therefore, admissible.

Exclusionary rule and exception

Automobile exception

State v. Shingleton, 301 S.E.2d 625 (1983) (Per Curiam)

Syl. pt. - Applies Syl. pt. 4, *State v. Moore*, 272 S.E.2d 804 (W.Va. 1980). (Found in Vol. I under this topic.)

Where trooper stopped defendant for exceeding the speed limit, the stop was lawful.

Defendant's conduct when questioned about rolls of coins viewed in his car following a lawful stop was sufficient to constitute probable cause to search the car where trooper had received a radio alert to look out for stolen coins and where trooper knew defendant's assertions were false.

Exclusionary rule and exception (continued)

Automobile exception (continued)

State v. Shingleton, (continued)

Probable cause to search exists where facts within the knowledge of the trooper are sufficient to warrant a prudent man in believing the automobile contains evidence of the commission of a crime.

Responses to police questions are often an ingredient in a probable cause decision.

Mobility of a vehicle, given the time necessary to obtain a search warrant, provides exigent circumstances justifying a warrantless search.

Knowledge of time required to obtain a warrant and belief that within that time defendant would post bond and be on his way, together with the fact that the passenger could have taken the car created exigent circumstances justifying a warrantless automobile search.

Where initial stop was legitimate, and where probable cause and exigent circumstances were present, search of the passenger part of the car was justified.

State v. Flint, 301 S.E.2d 765 (1983) (McHugh, J.)

Appellant contended the trial court erred in denying his motion to suppress evidence relating to a pistol which was found as a result of a warrantless search of the automobile in which he was a passenger. He contended that probable cause did not exist to initially stop the car. The Supreme Court found the facts indicated that the automobile was being driven in an erratic manner on a public highway. The officer testified that in the interest of public safety he stopped the vehicle to check on the condition of the driver to determine if he was driving under the influence of alcohol.

The Supreme Court found that the safety of the public necessitated the stopping of the erratically driven vehicle.

SEARCH AND SEIZURE

Exclusionary rule and exception (continued)

Automobile exception (continued)

Jordan v. Holland, 324 S.E.2d 372 (1984) (Per Curiam)

Relator was convicted of armed robbery. Three Shoney's employees were robbed while making a deposit at the Teays Valley Bank at 4 a.m. The face of one of the robbers was hidden by a ski mask. The face of the other was visible. Relator's pickup truck was found at 5:25 a.m. about 75 yards from the bank. It was searched and a registration certificate bearing the relator's name was found.

The Court applied the standard set forth in syl. pt. 3, *State v. Moore*, 272 S.E.2d 804 (W.Va. 1980).

The Court found after a check of the temporary license plate failed the deputy sheriff entered the truck, opened the glove compartment and found the temporary registration certificate bearing relator's name. The Court found a warrantless search of the glove compartment for ownership identification in these circumstances is not unreasonable since there is a likelihood such information will be found in the glove compartment and the exigency created by the flight of felons, necessitated the search be conducted without delay.

The Court concluded the seizure of the registration certificate, its subsequent use in obtaining an arrest warrant, and its introduction at trial to prove ownership of the vehicle did not violate relator's rights to due process. The Court also concluded there was no violation of relator's rights by the seizure of the empty holster, since it was in "plain view".

Consent search

State v. Farmer, 315 S.E.2d 392 (1983) (Neely, J.)

Appellant appeals the revocation of his probation on the grounds that the evidence used to sustain the revocation should have been excluded.

***State v. Farmer*,** (continued)

In this case, the sheriff's department received a complaint that some vehicles had been broken into and that certain items had been stole from a van. A witness observed people running from the van toward a passenger car with a certain license number. The same morning the reported license number was fed into the computer at the sheriff's department and it was indicated that the car was owned by the appellant. The vehicle's description matched the description given in the complaint.

The officers of the sheriff's department went to the vicinity of the appellant's residence and asked where they could find him. They were told that the appellant was living with his ex-wife. When the officers arrived at the address given to them, they observed a vehicle meeting the description with a license number matching the one that had been given by the witness. The officers checked the locked vehicle from the outside and observed certain items matching those reported stolen. The officers went to a neighboring house and were again advised that the appellant was living next door with his ex-wife.

The officers went to the ex-wife's house and knocked. Immediately after knocking the officers saw the appellant jump out of bed and run through the house. The officers continued knocking for approximately thirty minutes, and the appellant's ex-wife came to the door and denied the appellant was present inside. The officers informed her the appellant had been observed inside the house and that the officers were going to arrest him. One of the officers entered the house and found the appellant hiding in a closet. The officer placed the appellant under arrest and orally advised him of his rights. The appellant was told a search warrant would be obtained to search his car. The appellant said he would allow his ex-wife to open the trunk. The appellant gave her the key which she used to open the trunk. Inside the vehicles trunk were articles later identified as stolen. The appellant's ex-wife then unlocked the passenger compartment and handed the officers the other merchandise which had been in plain view.

See ARREST Warrantless home entries, (p. 31) for discussion of topic.

Exclusionary rule and exception (continued)

Consent search (continued)

***State v. Farmer*,** (continued)

Applies standard set forth in syl. pt. 8, *State v. Craft*, 272 S.E.2d 46 (W.Va. 1980). (Found in Vol. I under this topic.)

The Supreme Court found here the evidence clearly indicated the police explained to the appellant that he could either give them permission to search or they would get a search warrant. Because a warrant is not required for a search which is authorized by a proper consent, the search in this case was lawful.

The Court noted the government has the burden of demonstrating that consent was freely given and was not a result of duress, *Bumper v. North Carolina*, 391 U.S. 543 (1968), and that in determining whether the consent to search was voluntary, a court must look at the totality of the circumstances in much the same way as it does in evaluating the voluntariness of confessions. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973).

The Supreme Court found that in this case the appellant was neither threatened with an oppressive stick nor tempted with an illusory carrot. The officers accurately gave appellant his options: show us now or we will get a warrant and look later.

Emergency doctrine exception

State v. Cecil, 311 S.E.2d 144 (1983) (McHugh, J.)

The appellant plead guilty to murder of the first degree and sexual abuse in the first degree after the trial had begun. The State's evidence indicated the appellant sexually assaulted or abused and then murdered a three year old. Millie Jean Ratliff, and that the crimes occurred at the mobile home of Kenard and Vicky Ratliff where the appellant had been living. The Court noted the record indicated that to live in the mobile home, the appellant may have been paying "board" to the owners. According to the State, the appellant, after the murder, placed the body in a plastic bag and hid it under a bed.

State v. Cecil, (continued)

A general search for the child began that day and continued the next. On the second day of the search, the appellant was arrested near the mobile home for public intoxication. The Supreme Court noted the police converged upon the mobile home, acting upon information recently obtained from the appellant's father that the child had fallen and had been placed by the appellant in a plastic bag under a bed in the mobile home. The appellant told police where he lived and Kenard Ratliff permitted the officers to enter the home. The Supreme Court noted that the record clearly indicated that when the police officers entered the mobile home, the appellant, although under arrest for public intoxication, was not yet a suspect of a homicide and that the police officers were looking for the missing child, rather than attempting to secure evidence. The Court noted that immediately prior to finding the body the police were required to promptly assess ambiguous information concerning potentially life threatening consequences.

The appellant contended that the finding of the body resulted from a warrantless and unreasonable search and seizure, and that inasmuch as his counsel at trial did not pursue an issue concerning that search and seizure, his counsel was ineffective. The Supreme Court found no merit to these contentions.

Syl. pt. 2 - Although a search and seizure by police officers must ordinarily be predicated upon a written search warrant, a warrantless entry by police officers of a mobile home was proper under the "emergency doctrine" exception to the warrant requirement, where the record indicated that, rather than being motivated by an intent to make an arrest or secure evidence, the police officers were attempting an injured or deceased child, which child the officers had reason to believe was in the mobile home, because of information they received immediately prior to entry.

Exclusionary rule and exception (continued)

Fruit of the poisonous tree

State v. Hall, 298 S.E.2d 246 (1982) (McHugh, J.)

Appellant's assertion that the items seized during the second search should be suppressed is dependent upon the legality of the first search. Because the first search was proper, the Court found the appellant's assertion to be without merit.

State v. Mays, 307 S.E.2d 655 (1983) (Neely, J.)

See SELF-INCRIMINATION - STATEMENTS BY DEFENDANT Voluntariness, Unreasonable delay in taking before magistrate, (p. 525) for discussion of topic.

Good faith exception

***State v. Schofield*,** 331 S.E.2d 829 (1985) (Neely, J.)

In this case, the arrest warrant issued by the magistrate was defective in that sufficient information was not given by the officer for the magistrate to find probable cause. The officer, however, had an abundant amount of information implicating the appellant in the crime, but executed an affidavit stating only that the victim was shot to death.

The Court found the U.S. Supreme Court has refused to apply the exclusionary rule to cases in which the officer conducting the search acted in objectively reasonable reliance on a warrant issued by a magistrate that was later determined to be invalid. *U.S. v. Leon*, 104 S.Ct. 3405 (1984). The State Supreme Court found whether this case would come within *Leon's* exception to the good faith defense that disallows the defense if the warrant is facially defective is problematic; nevertheless, they found they did not need to reach that issue here because a warrantless arrest was entirely justified. See ARREST Warrant, Probable cause, (p. 29) for discussion of topic.

SEARCH AND SEIZURE

Exclusionary rule and exception (continued)

Home entries

State v. Farmer, 315 S.E.2d 392 (1983) (Neely, J.)

See ARREST Warrantless, Home entries, (p. 31) for discussion of topic.

Incident to arrest exception

State v. Flint, 301 S.E.2d 765 (1983) (McHugh, J.)

Appellant contended the trial court erred in denying his motion to suppress evidence relating to a pistol which was found as a result of a warrantless search of the automobile in which he was a passenger. He contended that the search of the automobile after his arrest was unreasonable. An officer in Las Vegas observed an automobile being driven in an erratic manner and decided, in order to determine the condition of the driver, to stop the automobile and make an inquiry. After activating his flashing lights and siren, the officer saw the appellant make gestures including taking an object from his waistband or pocket and placing it beneath the front seat. After stopping the car, the officer asked the occupants to exit and produce identification. Upon a check, the officer discovered that the appellant was wanted in West Virginia for "unlawful killing with a gun." Upon placing the appellant under arrest the officer looked under the front seat and found a .25 caliber pistol.

The Supreme Court found that the furtive gestures were coupled with the officer's knowledge that the appellant was wanted in West Virginia for an unlawful killing, and that these "reliable causative facts" established probable cause to believe that a weapon or evidence of the commission of a crime was placed beneath the front seat.

Applying the standards set forth in syl. pts. 4 and 5 of *State v. Moore*, 272 S.E.2d 804 (1980) and *New York v. Belton*, 453 U.S. 454 (1981), the Supreme Court found probable cause existed to search beneath the front seat of the automobile.

See ARREST Warrantless, When a seizure has occurred, (p. 37) for discussion of topic.

Exclusionary rule and exception (continued)

Incident to arrest exception (continued)

State v. Hodges, 305 S.E.2d 278 (1983) (McHugh, J.)

The appellant was stopped by the county sheriff for speeding and passing illegally. The sheriff had heard a rumor that the appellant carried a gun.

After he was stopped, appellant got out of his car, walked to the sheriff's car, signed the tickets which the sheriff had written and then turned away from the sheriff to return to his vehicle. The sheriff noticed the impression of a pistol in the appellant's rear pocket as he walked away. He stopped appellant, obtained the pistol and arrested him for carrying a dangerous weapon without a license. Appellant was convicted of this offense.

The Supreme Court found the search of appellant's person which produced the pistol and bullets introduced in evidence was proper and constitutionally unobjectionable as it was incident to a lawful arrest. Appellant's arrest was valid and the search which produced the gun was proper under the rule established in syl. pt. 6, *State v. Moore*, 272 S.E.2d 804 (W.Va. 1980). (Found in Vol. I under this topic.)

Independent source

State v. Aldridge, 304 S.E.2d 671 (1983) (Harshbarger, J.)

Syl. pt. 4 - The exclusionary rule has no application when the state learns from an independent source about the evidence sought to be suppressed.

Facts illegally obtained do not become inaccessible if knowledge of them is gained from an independent source.

The independent source rule has been applied to facts learned by police both before and after an alleged illegal search and seizure.

A sample of appellant's blood was taken upon an order of the trial court. That order was not founded upon an affidavit or sworn testimony. The results of the test were not introduced at trial. A second blood test, given

SEARCH AND SEIZURE

Exclusionary rule and exception (continued)

Independent source (continued)

***State v. Aldridge*,** (continued)

pursuant to a search warrant, was not the result of the first blood test. Both samples resulted from information about and observation of a laceration on appellant's hand. The illegality of the first test did not make results of the second test inadmissible as "fruits of the poisonous tree." Certain inadequacies in the analysis of the first blood test, made a second, more sophisticated, blood test potentially advantageous to appellant.

Inventory searches

State v. Perry, 324 S.E.2d 354 (1984) (Miller, J.)

Appellant was pulled over when a deputy sheriff noticed the car appellant was driving had a glaring headlight and an expired license plate sticker. Appellant was arrested for operating a vehicle without a license and was informed he would be taken to a magistrate and his car would be towed. An inventory search was subsequently conducted on the interior and trunk of the car. Marijuana was found in the trunk.

The Court addressed the issue of whether or not the arresting officer in this case was required to permit the appellant to make some alternative arrangement to police impoundment of his car.

Syl. pt. 1 - "The right to an inventory search begins at the point where the police have a lawful right to impound the vehicle." Syllabus point 1, *State v. Goff*, 272 S.E.2d 457 (W.Va. 1980).

Syl. pt. 2 - There is no need to confer with the owner or possessor of a car prior to impoundment concerning the disposition of his vehicle and its contents where he is unavailable, or physically or mentally incapable of making arrangements for its protection; or the vehicle has been stolen or has been used in the commission of a crime and its retention as evidence is necessary. However, in the situation where the owner or possessor of a vehicle has been arrested in or near his car, ordinarily, he must be given

State v. Perry, (continued)

reasonable opportunity to make some alternative disposition of the vehicle before the police may impound it for the sole purpose of protecting it and its contents from theft or damage.

The Court concluded the arresting officer in this case did not have a ground for impoundment that would enable him to avoid giving the driver a reasonable opportunity to make an alternative disposition and that the failure to permit such alternative disposition rendered the impoundment and inventory search valid. The state contended the lack of a driver's license or other identification justified the officer's belief that the car was stolen. The Supreme Court found this did not amount to probable cause in light of all the circumstances. The license plate number matched the number given by the defendant to the officer when he was first stopped. The passenger was the defendant's brother and identified himself as such. The car had not been reported as stolen. Finally, the arresting officer testified the true reason for impoundment was it was departmental policy to impound a car when a driver is arrested for a traffic violation. Under the facts of this case, the Court reversed and remanded.

In footnote 9, the Court noted that, although not raised, they believed that impoundment is, ordinarily, not justified for minor motor vehicle violations which could ordinarily be handled by a citation under *W.Va. Code* 17C-19-3, or where it would appear reasonable to have the driver follow the officer in his car to a magistrate office.

State v. Clements, 334 S.E.2d 600 (1985) (Brotherton, J.)

During the course of their investigation, the police searched the appellant's van with his consent. Despite the fact that an inventory is not required in W.Va in a warrantless search, one was prepared and a piece bloodstained foam, which became an important piece of evidence in the trial, was inadvertently omitted. The appellant contends this omission mandates sup

State v. Clements, 334 S.E.2d 600 (1985) (Brotherton, J.)

pression of the evidence. The Supreme Court found where no inventory was required, but the police voluntarily prepared one, the defendant was not prejudiced, no matter how poorly the police completed their task.

Appellant was convicted of murder and voluntary manslaughter. An important piece of evidence introduced at trial was a piece of yellow tubing found partially buried near appellant's residence. This tubing was later matched with tubing found around the neck of one of the victims. Appellant was arrested on an unrelated federal firearms charge. A.T.F. agents obtained a search warrant to search the appellant's residence. Despite the fact the residence was outside their jurisdiction, detectives for the city of Wheeling were requested to accompany the A.T.F. agents in the search. During the search, a Wheeling police detective found the yellow tubing, partially buried in the ground near the residence.

The appellant contends the yellow tubing was discovered as a result of an illegal search. The Supreme Court found although the officers had a right to be in and around the appellant's house, the yellow tubing was not an item listed on the search warrant. The Court found the law is clear the police may not use an initially lawful search as a means to conduct a broad, warrantless search. Here, the Court found the plain view exception to the warrant requirement permitted seizure of the evidence.

Syl. pt. 6 - The following requirements must be met for the plain view exception to apply:

(1) The police must observe the evidence in plain sight without benefit of a search;

(2) The police must have a legal right to be where they are when they make the plain sight observation; and

(3) The police must have probable cause to believe that the evidence seen constitutes contraband or fruits, instrumentalities or evidence of a crime. *State v. Stone*, 268 S.E.2d 50, 54 (W.Va. 1980).

State v. Aldridge, 304 S.E.2d 671 (1983) (Harshbarger, J.)

Appellant, who had been seen at the murder victim's residence, was stopped for questioning. Appellant was seated in the back of a police car during the questioning and later was driven to a point near his home and released. During the questioning, police noticed that appellant was wearing a glove in 60 degree weather and asked him to remove the gloves. The gloves covered a laceration on his right hand. Appellant had been seen in public with the injured hand.

Appellant was not arrested until informant told the police he had seen the injury two days after the crime and that appellant had admitted killing the victim.

Blood samples found inside the murder victim's house were different from those found outside the house. The judge issued and order authorizing a blood sample to be taken from appellant. The blood sample was analyzed but not introduced. Results of a second blood sample taken pursuant to a search warrant were introduced at a second trial.

Applies standard set forth in Syl. pt. 7, *State v. Preacher*. (Found in Vol. I under this topic.)

Under the facts of this case, appellant had, at most, a very limited reasonable privacy interest in keeping his glove on.

Syl. pt. 2 - When police officers reasonably suspect that a person has knowledge of or was involved in a homicide committed with a knife, and was himself cut, it is not an unreasonable search of the person within the meaning of the Fourth Amendment or Article III, Section 6 of West Virginia Constitution, to stop him and ask him to remove a glove covering his cut hand.

Syl. pt. 3 - A person has no reasonable expectation of privacy in what he knowingly exposes to the public.

SEARCH AND SEIZURE

In camera hearing

In general

State v. Ehtesham, 309 S.E.2d 82 (1983) (Per Curiam)

The appellant was found guilty of possession of a controlled substance with intent to deliver. On appeal he contended the trial court erred in refusing to allow him to present evidence at a suppression hearing.

In the course of the suppression hearing, Officer Alkire, who had procured the search warrant, was asked to identify the affidavits supporting the issuance of the warrant. The prosecutor had a written statement of the undercover informant taken by another trooper which was identified as State's Exhibit 2. The defense counsel sought to examine this statement and this led to a discussion between counsel and the court with regard to disclosing the name of the undercover informant.

The trial court, after hearing defense counsel outline his contentions, refused to require disclosure of the informant's name and held that the suppression motion would be denied. Defense counsel objected to the termination of the hearing and the court's refusal to permit him to cross-examine Officer Alkire.

The Supreme Court found that our law regarding the right to present evidence at a suppression hearing is:

Syl. pt. 1 - "A hearing on the admissibility of evidence allegedly obtained by an unlawful search contemplates a meaningful hearing, at which both the State and the defendant should be afforded the opportunity to produce evidence and to examine and cross-examine witnesses." Syl. pt. 2, *State v. Harr*, 156 W.Va. 492, 194 S.E.2d 652 (1973).

The Supreme Court did not believe the trial court provided a meaningful opportunity to defense counsel to develop the evidence surrounding the various issues raised and held the court erred in this respect.

The Court did not reverse the conviction but utilized a procedure they developed in analogous situations, i.e., where the trial court has neglected to hold an appropriate mandatory hearing. In accordance with this procedure,

***In camera* hearing** (continued)

In general (continued)

State v. Ehtesham, (continued)

the case was remanded to the circuit court with directions that it conduct a further suppression hearing as contemplated by *State v. Harr*. If the circuit court determines the evidence seized should be suppressed, then the defendant should be accorded a new trial. If the court determines the evidence should not be suppressed, the trial court should uphold the conviction without prejudice to the defendant's right to challenge the admissibility ruling on appeal.

Standing to raise issue

State v. Tadder, 313 S.E.2d 667 (1984) (McHugh, C. J.)

Officers responded to am anonymous call that glass was heard breaking at a grocery store. Upon arriving they noticed two men in the store. The two were placed in custody. A few minutes later, the officers noticed a truck pulling out of a parking lot near the store. The appellant was in the passenger seat of the truck. The officers stopped the truck, conducted a warrantless search of the vehicle and located in the glove compartment the wallets of the two men apprehended in the store. The driver of the truck and the appellant were taken into custody.

Defense counsel made no motion to suppress this evidence. The officers were permitted to testify during trial that they found the wallets in the truck.

The appellant alleged ineffective assistance in defense counsel's failure to move to suppress the evidence, and the search violated his constitutional rights.

Syl. pt.2 - Where police officers apprehended in a building two suspects of a breaking and entering of that building, and minutes thereafter the officers stopped a truck with two occupants attempting to leave the scene of the breaking and entering, a warrantless search of the vehicles by the officers, which resulted in the seizure from the glove compartment of the wallets of the suspects apprehended in the building, did not violate the defendant's

***In camera* hearing** (continued)

Standing to raise issue (continued)

State v. Tadder, (continued)

constitutional rights against unreasonable searches and seizures, where the record demonstrated that the defendant, as a passenger in the truck, had no property or possessory interest in the truck, its glove compartment, or the items seized and, therefore, suffered no invasion of a legitimate expectation of privacy.

The Supreme Court found the failure of defense counsel to move to suppress the evidence was not ineffective assistance, an no rights of the appellant to protection against unreasonable searches and seizures were violated.

Search outside lawful jurisdiction of officers

State v. Clements, 334 S.E.2d 600 (1985) (Brotherton, J.)

Appellant was convicted of murder and involuntary manslaughter. An important piece of evidence introduced at trial was a piece of yellow tubing found partially buried near appellant's residence. This tubing was later matched with tubing found around the neck of one of the victims. Appellant was arrested on an unrelated federal firearms charge. A.T.F. agents obtained a search warrant to search the appellant's residence. Despite the residence was outside their jurisdiction, detectives for the City of Wheeling were requested to accompany the A.T.F. agents in the search. During the search, a Wheeling police detective found the yellow tubing, partially buried in the ground near the residence.

Appellant contends the Wheeling police did not have authority to aid in the search outside their jurisdiction. The Supreme Court found federal agents may take other persons along to assist them in executing a warrant, so long as the officer who obtained the warrant is present and acting in the execution of the warrant. The Court found the Wheeling police were lawfully acting as assistants to the federal officers and had authority to aid in the search.

SEARCH AND SEIZURE

Warrant

Independent judicial evaluation

State v. Simmons, 301 S.E.2d 812 (1983) (Per Curiam)

Where magistrate questioned affiant carefully about the facts in the affidavit and made an independent determination that there was probable cause for issuance of a search warrant, he was not acting as a "mere agent" of the prosecution within the meaning of *State v. Dudick*, 213 S.E.2d 458 (W.Va. 1975) quoted in *State v. Wotring*, 279 S.E.2d 182 (W.Va. 1981). (Found in Vol. I under this topic.)

Informant's reliability

State v. Simmons, 301 S.E.2d 812 (1983) (Per Curiam)

When the affiant is the "informant", no independent determination of reliability is necessary.

Probable cause

State v. Hall, 298 S.E.2d 246 (1982) (McHugh, J.)

Here, information was given by the police officer to the magistrate concerning the reliability of the informant (including his identity), the personal observation of the informant and the trooper's independent verification that the items described by the informant had been reported as stolen. Therefore, the Supreme Court found that the appellant's contention that the search warrant was invalid because the affidavit failed to contain sufficient information to establish probable cause was without merit.

Appellant contended that the search was illegal in that the search was overly broad and the items seized were not sufficiently described as "hand tools, power tools, clearance lights contained in a cardboard box with the name Alfab, Inc., Smithville, W.Va. printed on the end of said box, pens with the name of Gilmer Fuel Company inscribed thereon. . . ". The Supreme Court found there could be no confusion under the terms of the warrant as to what was sought to be confiscated, and the search warrant was proper.

State v. Simmons, 301 S.E.2d 812 (1983) (Per Curiam)

Affidavit, completed and sworn to by affiant, did not misrepresent information where it stated that affiant had purchased marijuana from appellant and planned to purchase cocaine. Even though the sale fell through, it had been planned. Appellant's argument that the warrant was not based on probable cause because part of the information contained in it was misrepresented was without basis. Where an affidavit stated that affiant had purchased marijuana from appellant and indicated that appellant was engaged in various other drug deals, it contained sufficient allegations of a continuing course of conduct to establish the requisite probable cause to believe that contraband would be found at appellant's residence. The allegations were sufficient without considering affiant's statement concerning a planned cocaine sale.

Specificity of warrant

State v. Hall, 298 S.E.2d 246 (1982) (McHugh, J.)

See SEARCH AND SEIZURE Warrant requirement, Probable cause, (p. 474) for discussion of topic.

Validity of warrant

State v. Simmons, 301 S.E.2d 812 (1983) (Per Curiam)

Where the original search warrant issued by the magistrate was signed and dated, it was irrelevant whether the copy was dated. The search warrant was valid.

SELF-DEALING

County school superintendents

W.Va. Educ. Ass'n v. Preston County Board of Education, 297 S.E.2d 444 (1982) (Harshbarger, J.)

Syl. pt. - A county school superintendent's nomination of his wife for a central administrator's position violates our criminal statute against self-dealing and nepotism by public employees.

SELF-DEFENSE

In general

State v. Schaefer, 295 S.E.2d 814 (1982) (Per Curiam)

A criminal defendant "may interpose the defense of self-defense in protecting a member of his family as well as in protecting himself." *State v. W.J.B.*, 276 S.E.2d 550 (W.Va. 1981).

Assault

State v. Smith, 295 S.E.2d 820 (1982) (Harshbarger, J.)

See SELF-DEFENSE When defense may not be asserted, (p. 484) for discussion of topic.

Burden of proof

State v. Clark, 297 S.E.2d 849 (1982) (McGraw, J.)

Applies standard set forth in syl. pt. 4, *State v. Kirtley*, 252 S.E.2d 374 (W.Va. 1978). (Found in Vol. I under this topic.)

State v. Mullins, 301 S.E.2d 173 (1982) (Per Curiam)

Applies standard set forth in Syl. pt. 4, *State v. Kirtley*, 252 S.E.2d 374 (W.Va. 1978). (Found in Vol. I under this topic.)

State v. Thayer, 305 S.E.2d 313 (1983) (Per Curiam)

Applies standard set forth in Syl. pt. 4, *State v. Kirtley*, 252 S.E.2d 374 (W.Va. 1978). (Found in Vol. I under this topic.)

SELF-DEFENSE

Burden of proof (continued)

Retroactivity

State v. Mullins, 301 S.E.2d 173 (1982) (Per Curiam)

Applies standard set forth in Syl. pt. 4, *State v. Kirtley*, 252 S.E.2d 374 (W.Va. 1978). (Found in Vol. I under this topic.)

The Supreme Court found that in view of the fact that defense counsel in this case failed to object to the instruction on the ground contained in *Kirtley*, the giving of the instruction could not support the reversal of the defendant's conviction.

Character and reputation of victim

See EVIDENCE Victim-character and reputation, (p. 198) for discussion of topic.

Dwelling

State v. Phelps, 310 S.E.2d 863 (1983) (Per Curiam)

See SELF-DEFENSE Instructions, (p. 480) for discussion of topic.

Inconsistent verdicts

State v. Louk, 301 S.E.2d 596 (1983) (Harshbarger, J.)

The defendant was tried for first-degree murder and felonious assault. She presented self-defense evidence and was found guilty of voluntary manslaughter of one victim and not guilty of assaulting the other. On appeal, she contended the jury verdicts were inconsistent in that if she were not guilty of assault or malicious wounding because it was self-defense, she necessarily had the same jurisdiction for shooting the other victim. Both were shot during one fusillade. The Supreme Court found there was sufficient evidence for the jury to decide that the defendant entertained different intentions toward the two victims.

SELF-DEFENSE

Instructions

State v. Clark, 297 S.E.2d 849 (1982) (McGraw, J.)

Here, defense counsel offered a self-defense instruction approved by the Supreme Court in *Kirtley*. The trial court refused to give this instruction, and instead gave an instruction parallel to one found in *Kirtley* to be incorrect. The giving of this instruction was reversible error.

State v. Mullins, 301 S.E.2d 173 (1982) (McGraw, J.)

In this case, an instruction was given which informed the jury that if they believed that the defendant shot the victim "and that she, the [defendant] relies upon self-defense to excuse her from such act, the burden of showing such excuse is on the defendant." The Supreme Court found that in view of the fact that defense counsel in this case failed to object to the instruction on the ground contained in *State v. Kirtley*, 252 S.E.2d 374 (W.Va. 1978), the giving of the instruction could not support the reversal of the defendant's conviction.

The defendant asserted that her attorney was ineffective when he failed to object to an improper instruction given on self-defense. The Supreme Court found that this case was tried several months after the decision in *State v. Kirtley*, 252 S.E.2d 374 (W.Va. 1978) was published. The effect of the *Kirtley* decision was not to make a radical change in our substantive law of self-defense but to moderate our instructional law on the ultimate burden of proof.

The Supreme Court therefore found that the failure of defense counsel to object to the instruction did not constitute ineffective assistance of counsel such that the case should be reversed on that ground.

The defendant contended that the trial court erred in giving one of the defendant's instructions without deleting the language, "and the scuffle was started by the [victim]." The trial judge was of the view that this was a type of self-defense instruction and that the phase was proper to show that the victim was the aggressor. On appeal defendant contended it was an accidental killing instruction. The Supreme Court could not see how the phrase objected to prejudiced the defendant that carried overtones of self-defense and the defense attorney did not ask to have them deleted.

Instruction (continued)

State v. Thayer, 305 S.E.2d 313 (1983) (Per Curiam)

The Supreme Court found that State's instruction no. 17 incorrectly placed the burden of proof on the defendant under the preponderance of evidence standard and neglected to mention the State's burden, and that State's instruction no. 13 also improperly placed the burden of proving self-defense on the appellant under the improper standard. The Court found the giving of these instructions was not harmless error. Although the trial court did give one correct instruction offered by the defense on the issue of self-defense, the Supreme Court found this instruction, when considered by the jury along with the incorrect state instructions, only could have created confusion in the minds of the jurors.

State v. Phelps, 310 S.E.2d 863 (1983) (Per Curiam)

The appellant was convicted of voluntary manslaughter. On appeal he contended the trial court erred in refusing four of his offered instructions.

Syl. pt. 3 - "In this jurisdiction where there is competent evidence tending to support a pertinent theory of a case, it is error for the trial court to refuse a proper instruction, presenting such theory, when so requested, syl. pt. 4, *State v. Hayes*, 136 W.Va. 199, 67 S.E.2d 9 (1951)." Syl. pt 2, *State v. Smith*, 156 W.Va. 385, 193 S.E.2d 550 (1972).

One of the defendant's instructions read as follows:

"The Court instructs the jury that although upon a trial for murder, where the defendant relies upon self-defense, in justification of the killing, [such evidence must appear from the facts and circumstances of the case, and the State always has burden of] proving all the elements of murder if it seeks a conviction, beyond a reasonable doubt, and to the exclusion of every other reasonable hypothesis, and if, in the case on trial, the burden is upon the prisoner to prove that he was acting in self-defense by a preponderance of the evidence, yet this in no wise relieves the State, if it seeks a conviction, from proving the prisoner guilty beyond every reasonable doubt, and to the exclusion of every reasonable hypothesis, and if the State does not so prove the defendant guilty beyond every reasonable other hypothesis, they must find the defendant not guilty."

Instruction (continued)

State v. Phelps, (continued)

The Supreme Court found the trial court properly refused this instruction on the ground that it placed too heavy a burden upon the defendant to show he acted in self-defense.

Defendant's instruction No. 3 read:

"The Court instructs the jury that when a person reasonably apprehends that another intends to attack him for the purpose of killing him or doing him serious bodily harm, then such person has the right to arm himself for his own necessary self-defense."

The trial court refused this instruction because of the inapplicability of the instruction to the evidence.

The Supreme Court agreed that the instruction properly states the law of this jurisdiction. Unlike the trial court, the Supreme Court found a direct application of the law in the proposed instruction to the evidence offered by the defense. The appellant testified his mother woke him up and told him a guy with a gun was trying to rob her. On cross-examination the appellant testified that he had armed himself because his mother had told him the man had a gun and the appellant did not want to go into the room unarmed.

The Supreme Court found the trial court improperly refused this instruction.

Defendant's instruction No. 6 read as follows:

"The jury are instructed that a man may repel force by force, in defense of his person, or his home, against one who manifestly endeavors, by violence or surprise, to commit a know felony upon either; and in these cases he is not obliged to retreat, but may pursue his adversary until he has freed himself from all danger."

The trial court refused this instruction believing that a word had been omitted. The Supreme Court found the omission was actually a copying error which could have been easily corrected.

Instruction (continued)

State v. Phelps, (continued)

The Court found the language in *Stoneham v. Commonwealth*, 86 Va. 525, 10 S.E. 238 (1889), from which the instruction was taken, reads:

"A man may repel force by force, in defense of his person, or his property, [the trial court substituted home for property] against one who manifestly endeavors, by violence or surprise, to commit a know felony upon either; and in these cases he is not obliged to retreat, but may pursue his adversary until he has freed himself from all danger."

The Supreme Court found this was a correct statement of the law and should not have been refused.

Applies standard set forth in syl. pt. 4, *State v. Preece*, 116 W.Va. 176, 179 S.E. 524 (1935). (See syl. pt. 1, *State v. W.J.B.*, 276 S.E.2d 550 (W.Va. 1981), (found in Vol. I under SELF-DEFENSE Dwelling.

The Supreme Court found there was sufficient evidence to justify giving the instruction especially when the trial court had told the jury to accept as fact that the decedent was in the act of committing a felony - an armed robbery with a dangerous weapon.

The Supreme Court found that in the absence of other proper instructions and in view of sufficient evidence to justify giving instructions offered by appellant, they held that the refusal of defendant's instructions 3 and 6 was reversible error.

The Supreme Court also noted that the trial court's instruction No. 1 was full of error in that it failed to inform the jury on the law with respect to crime prevention in one's home as a justifiable defense to homicide, and it was therefore in direct contra-position to the rule enunciated in syl. pt. 2 of *State v. W.J.B.*, (See footnote 6 of case for Court's instruction No. 1.) The Supreme Court also found that State's instruction E (See footnote 7 of case for this instruction) failed to mention the alternative justification for the use of deadly force i.e. prevention or termination of a felony in one's home. The Court found no authority for allowing the jury to determine that the killing

SELF-DEFENSE

Instruction (continued)

State v. Phelps, (continued)

was not justified if they believed by preponderance, rather than beyond a reasonable doubt, that the defendant or his mother was being threatened with death or serious bodily harm by the victim and the gun he had.

Since there were no objections to these instructions, the issues were not raised on appeal, and since the Court reversed on other instructional errors, the Court did not further discuss these instructions.

Sufficiency of the evidence

State v. Schaefer, 295 S.E.2d 814 (1982) (Per Curiam)

The question of whether the defendant acted in self-defense was determined by the jury, which was fully instructed at the instance of the defendant upon every phase of the case. The Supreme Court found that the evidence did not create a reasonable doubt about whether the defendant acted in self-defense, and that the trial court did not err in denying a judgement of acquittal.

"It is peculiarly within the province of the jury to weigh the evidence upon the question of self-defense, and the verdict of a jury adverse to that defense will not be set aside unless it is manifestly against the weight of the evidence." Syl. pt. 5, *State v. McMillion*, 104 W.Va. 1, 138 S.E. 732 (1927).

State v. Phelps, 310 S.E.2d 863 (1983) (Per Curiam)

The appellant was convicted of voluntary manslaughter. On appeal he alleged that the trial court erred by not setting aside the verdict of the jury on the ground that it was contrary to overwhelming evidence of self-defense.

Applies standard set forth in syl. pt. 4, *State v. McMillion*, 104 W.Va. 1, 138 S.E. 732 (1927) cited above in *State v. Schaefer*.

SELF-DEFENSE

Sufficiency of the evidence (continued)

State v. Phelps, (continued)

The Supreme Court found that they could not say that the jury was "fully instructed upon every phase of the case, " (See SELF-DEFENSE Instructions) including the issue of self-defense. The Court therefore declined to make a determination of whether the verdict was contrary to the evidence.

When defense may not be asserted

State v. Smith, 295 S.E.2d 820 (1982) (Harshbarger, J.)

Syl. pt. - The general rule is that a person accused of an assault does not lose his rights to assert self-defense, unless he said or did something calculated to induce an attack upon himself.

"The provoking act on the part of accused, depriving him of the right of self-defense, need not be such as would give the party attacking him such right; but, before one accused of assault can be deprived of his right of self-defense on the ground of provoking the difficulty, he must have said or done something, for the purpose of inducing an attack upon him, which was calculated to bring about that result." 6A C.J.S. *Assault and Battery* § 91 (1975).

Here, the State's instructions, when read together, improperly described the behavior that will deprive a person of his right to assert self-defense. Instead of informing the jury that the privilege of self-defense is only lost where one intentionally provokes an assault and battery, the instruction spoke of indecent language that would disturb the tranquility enjoyed by the citizenry of the community. The Supreme Court found that that is not the law, and the probabilities were quite strong that the defendant was prejudiced by it.

SELF-INCRIMINATION

In general

State ex rel. Osburn v. Cole, 319 S.E.2d 364 (1983) (Miller, J.)

Syl. pt. 1 - The Fifth Amendment privilege against self-incrimination is not limited to the context of criminal trials but can be claimed in any proceeding, *whether* it is criminal or civil, administrative or judicial, investigatory or adjudicatory.

Syl. pt. 2 - The Fifth Amendment privilege against self-incrimination is not violated by information required to be furnished under State mandatory self-reporting systems which are essential to the fulfillment of a regulatory statute where (1) the information sought is facially neutral; (2) the information required is directed at the public at large and not to a selective group inherently suspect of criminal activities; (3) the area of inquiry is essentially noncriminal and regulatory and not permeated with criminal statutes; and (4) the possibility of incrimination is not substantial.

State v. King, 313 S.E.2d 440 (1984) (Per Curiam)

See NEW TRIAL - NEWLY DISCOVERED EVIDENCE In general, (p. 391) for discussion of topic.

State mandatory self-reporting systems

State ex rel. Osburn v. Cole, 319 S.E.2d 364 (1983) (Miller, J.)

Syl. pt. 2 - The Fifth Amendment privilege against self-incrimination is not violated by information required to be furnished under State mandatory self-reporting systems which are essential to the fulfillment of a regulatory statute where (1) the information sought is facially neutral; (2) the information required is directed at the public at large and not to a selective group inherently suspect of criminal activities; (3) the area of inquiry is essentially noncriminal and regulatory and not permeated with criminal statutes; and (4) the possibility of incrimination is not substantial.

SELF-INCRIMINATION - STATEMENTS BY DEFENDANT

In general

State v. Jackson, 298 S.E.2d 866 (1982) (Harshbarger, J.)

See SELF-INCRIMINATION - STATEMENTS BY DEFENDANT Statements to court-appointed psychiatrist, (p. 490) for discussion of topic.

Denial of right to counsel

See SELF-INCRIMINATION - STATEMENTS BY DEFENDANT Voluntariness, Right to counsel, (p. 514) for discussion of topic.

Failure to give *Miranda* warnings

State v. Samples, 328 S.E.2d 191 (1985) (Brotherton, J.)

Appellant was convicted of first degree murder with no recommendation of mercy. When the appellant returned home the day of the murders, he was immediately arrested and read the *Miranda* rights. Appellant gave a full confession to killing his step-brother and his step-brother's wife. The appellant also confessed to shooting Rick Arbogast two to three months earlier. Two attorneys were appointed to represent him. Appellant was admitted to Weston State Hospital for psychiatric testing and then returned to the county jail. Shortly after his return to jail, a Trooper interviewed him about his claim of shooting Rick Arbogast. Appellant's attorneys were not notified of this interview and appellant was not read his *Miranda* rights. Appellant told the trooper that he was putting on an act for the doctors at Weston and that he was not crazy.

Appellant contends error occurred when the trooper failed to read the *Miranda* warnings to him on the second interrogation.

Syl. pt. 1 - The fact that a criminal defendant has obtained counsel on an unrelated charge has no particular bearing on whether the defendant is willing to waive counsel on a separate charge. The State must, however, give the defendant *Miranda* warnings so that he may make an informed decision whether to have counsel on the separate charge. *State v. Clawson*, 270 S.E.2d 659, 669 (W.Va. 1980).

SELF-INCRIMINATION - STATEMENTS BY DEFENDANT

Failure to give *Miranda* warnings (continued)

State v. Samples, (continued)

The Court found appellant was not read his *Miranda* rights before the interrogation and cannot be said to have knowingly and intelligently waived counsel. The Court found it was error to admit appellant's statements about feigning insanity for the doctors at Weston.

Independent corroboration

State v. Taylor, 324 S.E.2d 367 (1984) (Per Curiam)

Appellant contends his conviction must be reversed because it was based on confessions that were not independently corroborated. The Supreme Court found a comparison of the trial testimony, the police reports and the confessions lead them to the conclusion that the various sources of material facts were in harmony; that is, the confessions were corroborated independently.

Syl. pt. 2 - "A conviction in criminal case is not warranted by the extrajudicial confession of the accused alone. The confession must be corroborated in a material and substantial manner by evidence *aliunde* of the *corpus delicti*. The corroborating evidence, however, need not itself be conclusive; it is sufficient if, when taken in connection with the confession, the crime is established beyond a reasonable doubt." Syl. pt. 1, *State v. Blackwell*, 102 W.Va. 421, 135 S.E. 393 (1926).

Material variance between indictment and confession

State v. Taylor, 324 S.E.2d 367 (1984) (Per Curiam)

Appellant was convicted of four counts of breaking and entering. He contends the trial court erred in failing to suppress his confessions since two of them were irrelevant because the dates of the offenses which the appellant admitted were different from the dates of the offenses as reported to the police by the victims. Appellant argues this discrepancy constitutes a material variance between the indictment, as particularized by the police

Material variance between indictment and confession (continued)

State v. Taylor, (continued)

reports, and the evidence offered by the State at trial. The Supreme Court found no merit to this contention. The Court found the state offered the testimony of the victims to establish the dates on which the brake-ins occur red. The Court found the dates contained in the confession, while differing from other evidence presented, do not render the confessions irrelevant. In addition, the Court found no error in allowing the police chief to testify that he simply misrecorded the dates.

Spontaneous, volunteered

State v. White, 301 S.E.2d 615 (1983) (Per Curiam)

Defendant voluntarily accompanied troopers to headquarters where she was advised of her constitutional rights. Defendant did not request a lawyer, and in response to questioning, gave a written statement which was subsequently admitted at trial. Based upon a transcript of the *in camera* pre-trial hearing held to determine the admissibility of defendant's statement, the Supreme Court determined that defendant had understood her rights and had chosen to waive them. Her statement was voluntarily and properly admitted.

State v. Young, 311 S.E.2d 118 (1983) (McGraw, C.J.)

See SELF-INCRIMINATION - STATEMENTS BY DEFENDANT Voluntariness, *In camera* hearing, (p. 504) for discussion of topic.

Statements made upon legal examination

State v. Fairchild, 298 S.E.2d 110 (1982) (McGraw, J.)

At appellant Damron's trial, a transcript of a hearing held before the Deputy Commissioner of Securities, at which Damron testified, was offered by the State as evidence. After an *in camera* hearing, at which it was determined

Statements made upon legal examination (continued)

State v. Fairchild, (continued)

that Damron's statement was voluntarily given after a valid waiver of rights, the trial court admitted the transcript into evidence, over the appellant's objection, and it was read to the jury.

The appellant contended that *W.Va. Code* § 57-2-3 (1966) prohibits admission of the transcript. The statute provides: "In a criminal prosecution other than for perjury or false swearing, evidence shall not be given against the accused of any statements made by him upon a legal examination." The appellant contends he did not waive his rights under *W.Va. Code* § 57-2-3 because no mention of the statute was made to him prior to or during his testimony before the Division of Securities.

The Supreme Court found that the appellant's assignment of error was not preserved below. The Court found that it is well established in West Virginia that: [W]here the objection to the admission of testimony is based upon some specific ground, the objection is then limited to that precise ground and error cannot be predicated upon the overruling of the objection, and the admission of the testimony on some other ground, since specifying a certain ground of objection is considered a waiver of other grounds not specified. *Leftwich v. Inter Ocean Casualty Co.*, 123 W.Va. 577, 585-586, 17 S.E.2d 209, 213 (1909) (Kenna, C.J., concurring.)

The Supreme Court found that the statement admitted into evidence was objected to on several grounds, all of which were properly overruled, but the theory raised on appeal was not presented to the trail court. A majority of the Court believed that the failure of the appellant to offer an objection based on *W.Va. Code* § 57-2-3 at trial operated as a waiver of that objection on appeal.

The Court also noted that the transcript clearly indicated that the appellant voluntarily testified before the Deputy Commissioner with the full realization that his statements would be used against him in any subsequent criminal prosecution. The Court believed that the appellant waived any objection based on *W.Va. Code* § 57-2-3 to the use of his testimony at a subsequent criminal prosecution.

SELF INCRIMINATION - STATEMENTS BY DEFENDANT

Statements to court-appointed psychiatrist

State v. Jackson, 298 S.E.2d 866 (1982) (Harshbarger, J.)

The appellant argued that his incriminating statements to the court-appointed psychiatrist should have been inadmissible because they were not part of a custodial interrogation and were not prefaced by *Miranda* warnings, and because he did not have his lawyer with him. *Miranda* warnings were devised to make sure a criminal defendant understands his Fifth Amendment privilege against self-incrimination and his Sixth Amendment right to counsel. They are appropriate at "custodial interrogations" and protect a defendant from involuntarily incriminating himself, but are not the only means of guaranteeing a defendant freedom from involuntary self-incrimination.

The Supreme Court agrees with those courts that hold a defendant may be compelled to participate in a psychiatric examination for competence to stand trial and for criminal responsibility if he presents or intends to present an insanity defense relying on expert psychiatric or psychological evidence. The Court acknowledges that a court-ordered psychiatrist is, for purposes of a self-incrimination analysis, a State agent who questions a defendant while he is in custody.

A pre-trial psychiatric examination is a "custodial interrogation" by a State agent. The Fifth Amendment and *W.Va. Const.*, art. III, § 5 self-incrimination privileges are implicated.

The Court found it is possible to compel a defendant to be examined by a psychiatrist to evaluate his insanity defense without abrogating his Fifth Amendment privilege against self-incrimination. The Court found that safeguards other than *Miranda* protections can adequately protect a defendant and also provide the State an opportunity to get its own evidence about mental condition.

The Court found there should be an *in camera* hearing before the government psychiatrist testifies, to excise any portions of his report and proposed testimony that include incriminating statements. A psychiatrist can testify to the basis of his medical opinion, but without reference to a defendant's specific statements about his criminal offense. This *in camera* hearing should obviate the need for instruction limiting a jury's consideration of a psychia

Statements to court-appointed psychiatrist (continued)

State v. Jackson, (continued)

trist's testimony to facts or opinions on the issue of insanity (probably a useless act when a medical person has testified to a defendant's revelation to him of incriminating facts.) Should there be any questions about such revelation to the medical witness, inadvertently mentioned to the jury, then, of course, a limiting instruction should be given.

A defendant who plead insanity does not have the privilege to "remain silent" as *Miranda* warnings advise. His refusal to be examined - an event that necessarily involves talk - may result in sanctions such as preventing him from submitting his own medical evidence of insanity. The apparent coercive nature of the inter view is alleviated by the *in camera* hearing protection so that his statements cannot be used against him. This protects the first two prongs of *Miranda* warnings.

The third element of a defendant's *Miranda* protections involves his right to counsel. This federal and concomitant state right to counsel arise at each "critical stage" is "where the defendant's right to a fair trial will be affected." Certainly, the results of a psychiatric examination bear greatly on his fair trial rights.

The Supreme Court found that *W.Va. Const.* art. III, § 14 affords a defendant the right to assistance of counsel at a pre-trial psychiatric interview, but does not require counsel's presence at the actual examination. Some state courts have permitted a lawyer to be present, but the court believed counsel's presence could affect the examination's accuracy and effectiveness.

Syl. pt. 2 - Protection of a defendant's constitutional privilege against self-incrimination and right to assistance of counsel at pre-trial court-ordered psychiatric examinations, requires a tape recording of the entire interview be given to his and the government's lawyer, and an *in camera* suppression hearing be held to guarantee that the court-ordered psychiatrist's testimony will not contain any incriminating statements.

SELF-INCRIMINATION - STATEMENTS BY DEFENDANT

Statements to court-appointed psychiatrist (continued)

State v. Jackson, (continued)

When a court, on its own or the State's motion, orders a pre-trial psychiatric examination of a defendant, the Supreme Court can presume there is a question about defendant's competency or mental condition. To guarantee that state and federal constitutional rights are scrupulously honored in these circumstances, the Court found that no waiver of these rights will be effective without advise of counsel.

Syl. pt. 3 - A defendant cannot waive his state and federal constitutional privileges against self-incrimination and rights to assistance of counsel at court-ordered pre-trial psychiatric examinations except upon advise of counsel.

Tape-recording

State v. Clements, 334 S.E.2d 600 (1985) (Brotherton J.)

See EVIDENCE Tape-recording, (p. 196) for discussion of topic.

Voluntariness

In general

State v. Clements, 334 S.E.2d 600 (1985) (Brotherton, J.)

See EVIDENCE Tape-recording, (p. 196) for discussion of topic.

Adoptive admission

State v. Howerton, 329 S.E.2d 874 (1985) (Miller, J.)

See SELF-INCRIMINATION - STATEMENTS BY DEFENDANT Voluntariness, Under the influence of sodium amytal, (p. 523) for discussion of topic.

SELF-INCRIMINATION - STATEMENTS BY DEFENDANT

Voluntariness (continued)

Appellate review

State v. Clark, 297 S.E.2d 849 (1982) (McGraw, J.)

See SELF-INCRIMINATION - STATEMENTS BY DEFENDANT Voluntariness, *In camera* hearing, (p. 504) for discussion of topic.

State v. Sparks, 298 S.E.2d 857 (1982) (Per Curiam)

Applies standard set forth in syl. pts. 2 and 3, *State v. Vance*, 250 S.E.2d 146 (W.Va. 1978). (Found in Vol. I under this topic.)

State v. Jackson, 298 S.E.2d 866 (1982) (Harshbarger, J.)

A trial judge's determination that a confession is admissible will not be disturbed unless he was plainly wrong.

State v. Cecil, 311 S.E.2d 144 (1983) (McHugh, J.)

Applies standard set forth in syl. pts. 2 and 3, *State v. Vance*, 250 S.E.2d 146 (W.Va. 1978). (Found in Vol. I under this topic.)

State v. Hillard, 318 S.E.2d 35 (1983) (McGraw, J.)

Applies standard set forth in syl. pt. 2, *State v. Vance*, 250 S.E.2d 146 (W.Va. 1978). (Found in Vol. I under this topic.)

See SELF-INCRIMINATION - STATEMENTS BY DEFENDANT Voluntariness, Fruit of the poisonous tree, (p. 497) for discussion of topic.

Voluntariness (continued)

Appellate review (continued)

State v. Gum, 309 S.E.2d 32 (1983) (McGraw, C.J.)

Applies standard set forth in syl. pt. 3, *State v. Vance*, 250 S.E.2d 146 (W.Va. 1978). (Found in Vol. I under this topic.)

State v. Cheshire, 313 S.E.2d 61 (1984) (Per Curiam)

Applies standard set forth in syl. pt. 3, *State v. Vance*, 250 S.E.2d 146 (W.Va. 1978). (Found in Vol. I under this topic.)

Burden of proof

State v. Clark, 297 S.E.2d 849 (1982) (McGraw, J.)

Applies standard set forth in syl. pt. 5, *State v. Starr*, 216 S.E.2d 242 (W.Va. 1975). See *State v. Vance*, 250 S.E.2d 146 (W.Va. 1978). (Found in Vol. I under this topic.)

See SELF-INCRIMINATION - STATEMENTS BY DEFENDANT Voluntariness, *In camera* hearing, (p. 504) for discussion of topic.

State v. Jackson, 298 S.E.2d 866 (1982) (Harshbarger, J.)

The State must prove admissibility of a confession by a preponderance of the evidence. The State's burden is heavy.

State v. Hillard, 318 S.E.2d 35 (1983) (McGraw, J.)

Applies standard set forth in syl. pt. 5, *State v. Starr*, 216 S.E.2d 242 (W.Va. 1975). See *State v. Vance*, 250 S.E.2d 146 (W.Va. 1978). (Found in Vol. I under this topic.)

Voluntariness (continued)

Coercive

State v. Taylor, 324 S.E.2d 367 (1984) (Per Curiam)

Appellant contends his confessions were involuntary in that (1) it was coerced by a threat to invoke the habitual criminal offender statute and imprison the appellant for life; and (2) the police chief offered to talk to the prosecutor about a plea bargain. The Supreme Court found Chief Speece denied making any threats, and he also testified that he told the appellant, after taking the statements, that the judge might accept a plea of guilty to one charge and allow the others to be dismissed. At the close of the suppression hearing, the Court found that the appellant's testimony was not credible and that there was neither intimidation nor coercion in the manner in which the statements were elicited. He further found the appellant to be sophisticated and well educated. For these reasons, the trial court concluded the confessions were voluntary. The voluntariness issue was also submitted to the jury with a proper instruction, as requested by the defense. The Supreme Court found the trial judge's decision was neither clearly wrong nor clearly against the weight of the evidence.

State v. Manns, 329 S.E.2d 865 (1985) (Miller, J.)

Appellant was extradicted from Maryland to West Virginia on a murder warrant. He contends the trip back to W.Va. involved a coercive setting. He cites *State v. Mollohan*, 272 S.E.2d 454 (W.Va. 1980) where the Court held a confession obtained during a two-day trip from New Hampshire to West Virginia was involuntary. The Court found significant differences exist between *Mollohan* and the present case, noting that the troopers testified on two occasions when they initially tried to obtain information from the defendant about the crime, he stated he did not wish to discuss the matter, that the defendant in *Mollohan* had a borderline I.Q. and that he did not confess until the troopers exploited his avowed religious beliefs.

Voluntariness (continued)

Fruit of the poisonous tree

State v. Williams, 301 S.E.2d 187 (1983) (Neely, J.)

The appellant was convicted of the murder of Carlton Harris. In an appeal from a prior conviction for the murder of Dorothy Harris, the Supreme Court found the appellant's first confession inadmissible. The Court found that the inadmissibility of the first confession gives rise to a presumption that the subsequent confessions share its taint. The standards that the State must meet in order to use subsequent confessions is that the connection between them and the inadmissible first confession must have become "so attenuated as to dissipate the taint."

At approximately 1:25 a.m. five police officers went to the appellant's home and requested that he voluntarily come to the police station. He agreed, was taken to the station, and at 1:55 a.m. signed a waiver of rights. During the questioning the appellant assented to a search of his clothing. The search produced a watch belonging to the victim, and presented with the watch, the appellant began to confess. At 3:00 a.m., the appellant's first statement, the statement ruled inadmissible in the first case, was taken.

The first of the subsequent confessions was taken at 5:05 a.m. The appellant was then incarcerated at 6:00 a.m. At 8:30 the following morning, another confession was taken. The fourth confession was taken at 1:15 p.m. the following day, and the final at 6:45 p.m. the day after that.

The Supreme Court found the totality of the circumstances indicated that the subsequent confessions were not voluntary and independent, but rather were more fruit of the original "poisonous tree." The Court found the standard of admissibility for the later confessions was raised by the inadmissibility of the first confession s the product of an involuntary custodial search. The confession not only hd to be "voluntary", but also in some way independent of or distinct from the original confession. Second, the appellant's mental disability raised the question of his ability to understand the *Miranda* warnings, rendered him highly suggestible, and implied that he may have been so incapable of gathering his limited wits about him such that the subsequent confessions would not be the product of mental regrouping required for the confession to be independent and voluntary. Third, the

Voluntariness (continued)

Fruit of the poisonous tree (continued)

State v. Williams, (continued)

factors suggest that there were no breaks in the causative link connecting the confessions. Finally, and perhaps most importantly, the confessions appeared in fact to be cumulative. The Supreme Court noted in footnotes that the appellant did not request a lawyer, and the confession did not fail on the basis of appellant's lack of legal counsel. However, advise of counsel and the presence of the lawyer at an interrogation would, in these circumstances, very likely indicate a break in the causative link connecting that confession to prior confessions.

It was reversible error for the trial court to admit the confessions into evidence.

State v. Hillard, 318 S.E.2d 35 (1983) (McGraw, J.)

The appellant was convicted of grand larceny. Following up on information provided by a confidential informant the police located the stolen vehicle and placed the car under surveillance. The appellant was apprehended with four others at the stakeout.

While the suspects were lined up at the scene with their hands in the air, one of the officers approached the appellant, pointed his finger at him accusatorily and ordered him to come with him. The officer grabbed the appellant by the shirt and forcibly took him behind another officer's truck away from anyone else. The appellant testified that the officer then held up a long flashlight and told appellant he'd better tell who took the car or the officer would knock his head off. The appellant did not respond as the officer then handcuffed him and took him to the backseat of a police cruiser where he was read his rights by another officer. As soon as his rights were read and while seated next to the officer who had threatened him, the appellant began telling the officer he and Donald Davis had stolen the car. The officer who had read the miranda warning testified that he asked the appellant to wait until he got back to the courthouse and he'd take a written statement. The appellant was taken to the courthouse - a ten or fifteen minute trip - and his confession was taken within

Voluntariness (continued)

Fruit of the poisonous tree (continued)

State v. Hillard, (continued)

thirty minutes of his arrival at the courthouse. He signed a waiver of rights form, but testified he only signed it because an officer told him to sign it and that he was tired and wanted to get out.

The appellant testified he was frightened because he heard a gunshot from the hillside overhead immediately prior to his apprehension, and that he felt threatened at being singled out from the others and at being taken out of everyone else's presence, that he was aware that the officer who threatened him had a reputation for beating up people, and the officers words and actions made him afraid.

The Supreme Court found there was no question that the appellant's statement in the police cruiser immediately after being threatened were coerced. The State did not attempt to introduce these statements. The issue was whether there was "a break in the causative link running between" this confession and the one taken by police approximately forty-five minutes later.

"The standard that the State must meet in order to use subsequent confessions is that the connection between them and the inadmissible first confession must have become "so attenuated as to dissipate the taint." *State ex rel. Williams v. Narick*, 264 S.E.2d 851, 855 (W.Va. 1980). *State v. Williams*, 301 S.E.2d 187 at 189 (W.Va. 1980).

Syl. pt. 2 - Where an accused makes a confession as the result of illegal coercion, and upon subsequent questioning again confesses, there is a rebuttal presumption that the second and each succeeding confession is a product of those that precede it.

Voluntariness (continued)

Fruit of the poisonous tree (continued)

State v. Hillard, (continued)

In this case the officer who threatened to knock the appellant's head off did not testify either at the voluntariness hearing or at trial, the officers who did testify admitted that this officer took the appellant out of sight and hearing but could not confirm or deny the fact that this threat was made. The Supreme Court found there was no evidence before the trial court to weigh concerning the coercive nature of the appellant's first confession and therefore the trial court's finding on this point that there was no threat, fear or inducement was plainly wrong.

The Supreme Court then focused on whether there was a "break in the causative link between the [two] confessions under the Williams cases to render the second confession voluntary. The Court found that while in the middle of his initial confession, appellant was told to wait and repeat his story at the courthouse. He then had to ride with the officer who had threatened him in the backseat of the cruiser. Ten to fifteen minutes after he arrived at the courthouse his statement was taken. The threatening officer was not present at the time the second confession was given, but he was in the vicinity. There was little difference between the initial statement and the statement at the courthouse. The Supreme Court, in comparing this case with the *Williams* case, noted the appellant's volition could readily be diminished by his low intelligence that the nexus between the confessions was substantially closer than the nexus between the confessions in *Williams*, and the potential for the continued influence of coercion was much greater than the confrontation with illegally seized evidence in *Williams*. The Supreme Court held, as they did in *Williams*, that the circumstances of this case compelled the conclusion there was no break in the causal link between the two confessions. Reversed and remanded.

Voluntariness (continued)

Illegal arrest

State v. Sprouse, 297 S.E.2d 833 (1982) (Per Curiam)

Applies standard set forth in syl. pt 3, *State v. Canby*, 252 S.E.2d 164 (W.Va. 1979) and syl. pt. 2, *State v. Stanley*, 284 S.E.2d 367 (W.Va. 1981). (Found in Vol. I under this topic.)

See ARREST Warrantless, Probable cause and exigent circumstances, (p. 35) for discussion of topic.

The Supreme Court found that *Miranda* warnings alone are not sufficient to purge the taint. The temporal proximity between the defendant's illegal arrest and his oral confession two hours later was strong evidence that the causal connection between the arrest and his confession was not broken. The defendant had been in jail overnight and, after being released on another charge, was not permitted to leave the police station. There was no evidence of any ameliorating circumstances intervening between the arrest and confession. During the approximately two hour interval, the defendant was subjected to nearly continuous interrogation. There was little opportunity for reflection and he was alone, without the benefit of counsel or friends. Additionally, there was no evidence to indicate the police were not seeking to exploit the illegal detention. The judgement was reversed and the case remanded.

State v. Mays, 307 S.E.2d 655 (1983) (Neely, J.)

See SELF-INCRIMINATION - STATEMENTS BY DEFENDANT Voluntariness, Unreasonable delay in taking before magistrate, (p. 525) for discussion of topic.

State v. White, 301 S.E.2d 615 (1983) (Per Curiam)

Appellant was convicted of second degree murder. She alleged that a statement given by her to police was the product of an illegal arrest. The Supreme Court found this to be without merit and found appellant accompanied the police to headquarters completely voluntarily.

Voluntariness (continued)

Illegal arrest (continued)

State v. Schofield, 331 S.E.2d 829 (1985) (Neely, C.J.)

Syl. pt.1 - An affidavit stating only that the victim was "shot to death" does not enable a magistrate to find sufficient probable cause to issue an arrest warrant.

Syl. pt. 2 - The appellant's arrest pursuant to an invalid arrest warrant at the home of a third party was nevertheless permissible because the arresting officers had independent, reasonable grounds to believe that she had committed a felony.

The Court found since the arrest of the appellant was valid, her subsequent spontaneous statements did not warrant suppression.

Appellant contends the court erred in admitting post-arrest statements into evidence since these statements were the product of an unlawful arrest and thus, "fruits of the poisonous tree." The Supreme Court agreed the arrest warrant was defective, but that, under these circumstances, the arrest was valid. See ARREST Warrant, Probable cause, (p. 29) for discussion of topic.

The Court held the appellants' arrest, pursuant to an invalid arrest warrant, at the home of a third party was permissible because the arresting officers had reasonable grounds to believe that she had committed a felony. The Court found since the arrest of the appellant was valid, her subsequent spontaneous statements did not warrant suppression.

State v. Wyant, 328 S.E.2d 174 (1985) (Per Curiam)

Appellant was convicted of first degree murder. He contends on appeal that although he was not formally arrested, he was taken into custody when he was picked up for questioning by the police. He alleges that since there was no probable cause to arrest him at the time, the confession obtained should have been excluded as the product of an illegal arrest.

Voluntariness (continued)

Illegal arrest (continued)

State v. Wyant, (continued)

The Court found this contention is not supported. They found the appellant voluntarily accompanied police for questioning and that once he arrive at the station, he was advised on two separate occasions that he was not under arrest and was free to leave. On both occasions he indicated his desire to remain and cooperate. The Court found there was no evidence that would lead a reasonable person to conclude appellant was effectively deprived of his liberty at that point. The Court found it was not until appellant began making incriminating statements that his presence at the station could be viewed as anything but voluntary. At that point there was probable cause to detain him. The Court found no evidence of unlawful arrest which would vitiate the confession.

State v. Howerton, 329 S.E.2d 874 (1985) (Miller, J.)

Appellant contends his confession was invalid because no exigent circumstances existed justifying his arrest without a warrant. He relies on syl. pt. 1 of *State v. Canby,* 252 S.E.2d 164 (W.Va. 1979). Canby dealt with the warrantless arrest of a defendant in his home.

The Court found here, the defendant was not arrested in his home but after he was brought to the police station. The Court relied on the following language from *State v. Craft*, 272 S.E.2d 46, 54 (W.Va. 1980): "There is little question that the right to arrest in public without a warrant, based on probable cause that the person has or is about to commit a felony, is the general if not universal rule in this country." The Court found the defendant did not contend the police lacked probable cause to place him under arrest at the police station and, therefore, his arrest was valid.

Voluntariness (continued)

***In camera* hearing**

State v. Clark, 297 S.E.2d 849 (1982) (McGraw, J.)

During the hearing, part of the State's burden is to prove that the defendant prior to the giving of a confession was given the rights constitutionally mandated in *Miranda*. The focus of the hearing, however, is not merely on whether the arresting officer properly informed the accused of her rights. Rather, voluntariness must be gauged by the totality of the circumstances under which it was given including the background, experience, and conduct of the accused.

Basing its decision on the preponderance standard, the trial court must make findings of fact and conclusions of law regarding the admissibility of the evidence. When credibility of the witnesses is determinative on the issue of whether to admit or exclude evidence, the trial court must clearly indicated why it chose to believe one witness more than another.

Such findings and conclusions are necessary for appellate review.

State v. Jackson, 298 S.E.2d 866 (1982) (Harshbarger, J.)

See SELF-INCRIMINATION - STATEMENTS BY DEFENDANT Statements to court-appointed psychiatrist, (p. 490) for discussion of topic.

State v. Young, 311 S.E.2d 118 (1983) (McGraw, J.)

After the murder, appellant traveled to his sister's home and then to his sister's daughter and son-in-law's home - Debbie and Mike Tivner. While at the Tivner's, appellant wrote a statement in which he admitted killing the victim. He then directed Mr. Tivner to make two hand written copies of the statement. The appellant signed them, witnessed by Mr. Tivner. The copies of the statement were introduced into evidence.

Voluntariness (continued)

***In camera* hearing** (continued)

State v. Young, (continued)

The appellant objected to the admission of the statement contending there was no showing the statements were voluntarily made and that considerable doubt surrounded their authenticity. These contentions were premised upon his claims that he was intoxicated at the time the statements were made, and he could not recall signing them.

The Supreme Court found the appellant's claims were without merit. The statements were made by appellant prior to his being taken into custody by the authorities. The Supreme Court found that, consequently, an *in camera* hearing to determine voluntariness was not required.

Applies standard set forth in syl. pt. 1, *State v. Johnson*, 226 S.E.2d 442 (W.Va. 1976). See *State ex rel. White v. Mohn*, 283 S.E.2d 914 (W.Va. 1981). (Found in Vol. I under this topic.)

The Supreme Court noted that although the appellant's claim that he was intoxicated at the time the statements were made may have some bearing upon the reliability of the statements, such claim did not preclude their admission into evidence. Rather, it was properly a matter of the weight the jury should attribute to the statement.

The Supreme Court found the authenticity of the statements was clearly established by the testimony of two witnesses who were both present at the time the statements were made and who both testified that the appellant signed the statement.

State v. Hillard, 318 S.E.2d 35 (1983) (McGraw, C. J.)

Applies standard set forth in syl. pt. 1, *State v. Fortner*, 150 W.Va. 571, 148 S.E.2d 169 (1966), overruled in part, *State ex rel. White v. Mohn*, 283 S.E.2d 914 (W.Va. 1981). See *State v. Persinger*, 286 S.E.2d 261 (W.Va. 1982). (Found in Vol. I under this topic.)

Voluntariness (continued)

Inducement or coercion

State v. Sparks, 298 S.E.2d 857 (1982) (Per Curiam)

The appellant contended that he made no voluntary, knowing and intelligent waiver of his right to remain silent, and that therefore the court erred in admitting his written statement into evidence.

In this case, the Supreme Court found that the testimony during the *in camera* hearing shows no representations "calculated to foment hope or despair" in the mind of the appellant, nor any promises or threats made to induce him to confess.

The statement that his brother had implicated him in the crime, a fact which would affect his trial, does not make his confession inadmissible. Although the appellant testified later that the officers promised to drop the charges if he paid civil damages, he chose not to testify at the *in camera* hearing. This information was not before the court at the time his confession was found to be voluntary. Even with this testimony, however, the record amply supports the trial court's findings. The Supreme Court found, therefore, that the court did not abuse its discretion in holding the statement admissible.

Intoxication

State v. Guthrie, 315 S.E.2d 397 (1984) (Harshbarger, J.)

The appellant contended he was unable to give a voluntary confession because he was too intoxicated on drugs and alcohol to knowingly and intelligently waive his rights. The Supreme Court found the trial judge heard the testimony and was in the best position to evaluate the credibility of witnesses. The Court could not say the trial judge erred.

SELF-INCRIMINATION - STATEMENTS BY DEFENDANT

Voluntariness (continued)

Intoxication (continued)

State v. Hall, 328 S.E.2d 206 (1985) (Miller, J.)

Appellant was convicted of second degree murder and unlawful wounding. On appeal, he contends he was too intoxicated to voluntarily and intelligently waive his constitutional rights. The Court found the evidence indicates appellant had been drinking but there was conflicting evidence on both the amount of alcohol he consumed and the degree of his intoxication. When the arresting officers came to the scene, they indicated the defendant appeared rational and coherent. The trial court found the appellant possessed a good recollection of the events and was not impaired by way of intoxication. The trial court was of the view there was no evidence to demonstrate that he was so affected by alcohol that he had lost the ability to comprehend what was occurring.

Syl. pt. 1 - A claim of intoxication may bear upon the voluntariness of a defendant's confession, but, unless the degree of intoxication is such that it is obvious that the defendant lacked the capacity to voluntarily and intelligently waive his rights, the confession will not be rendered inadmissible.

The Court found the trial court was correct in concluding that the defendant knowingly and intelligently waived his constitutional rights and that his confession was not rendered inadmissible by virtue of intoxication.

Knowledge of co-defendant's confession

State v. Cooper, 304 S.E.2d 851 (1983) (Harshbarger, J.)

Syl. pt. 1 - A truthful statement by the police that a co-defendant confessed, implicating a defendant, doe not make a subsequent confession by him inadmissible.

Voluntariness (continued)

Knowledge of co-defendant's confession (continued)

State v. Cooper, (continued)

Appellant was properly advised of his rights, and signed a waiver. He was not subjected to trickery, coercion or duress, and the State proved by a preponderance of evidence the voluntariness of his confession; therefore, the mere fact that appellant's confession was prompted by officers' statements that a co-defendant had implicated him was not enough to invalidate the confession.

Mental capacity

State v. Jackson, 298 S.E.2d 866 (1982) (Harshbarger, J.)

Applies standard set forth in syl. pt. 4, *State v. Fischer*, 211 S.E.2d 666 (W.Va. 1974). See *State v. Daggett*, 280 S.E.2d 545 (W.Va. 1981). (Found in Vol. I under this topic.)

In this case, the Supreme Court found that the defendant's confession was highly suspect because only a few days after the homicide, which happened on the same day he gave the statement, he was ordered to Weston State Hospital and was there determined incompetent to stand trial. He remained incompetent for one and a half years. The Supreme Court reversed the case on other grounds but found that on remand defendant's competency to knowingly and intelligently waive his right to counsel and capacity to make a statement should be carefully studied before a decision is made that his statement is admissible.

State v. Cheshire, 313 S.E.2d 61 (1984) (Per Curiam)

In appellant's first appeal, the Supreme Court remanded finding the trial court did not conduct a proper competency hearing and make adequate findings of fact as to the defendant's competency to plead guilty. On remand the trial court conducted further hearings, made detailed findings and found from a preponderance that the defendant was competent to enter the guilty pleas to

Voluntariness (continued)

Mental capacity (continued)

State v. Cheshire, (continued)

two counts of forgery and that she voluntarily waived her rights before confessing to an arson charge that influenced the trial court to deny probation. The trial court denied her motion to vacate the guilty pleas, denied probation and sentenced her.

Appellant plead guilty to two counts of forgery. The trial court planned to grant probation on the forgery convictions until the State presented evidence indicating that the appellant had confessed to an assistant state fire marshall that she had subsequently committed an arson.

The appellant alleged the trial court erred in considering her confession to the arson charge in denying probation. The Supreme Court understood this assignment to be the State did not show by a preponderance of the evidence that she had the mental capacity of making a voluntary and knowing confession or to waive her *Miranda* rights.

The assistant State Fire Marshall, Roush, testified that after the arson was committed, he received a phone call from the defendant's husband stating that she had threatened to commit an arson two or three days before the crime. Based on this, Roush phoned the defendant and asked to come to her residence to talk and the defendant agreed, and when Roush learned she had two children at home, he suggested she meet him outside. As he drove up, the defendant came out. Due to cold weather, Roush suggested she get into the car Roush immediately told her she was not under arrest and could leave at any time. He then fully advised her of her *Miranda* rights and she signed a waiver. She confessed to the arson.

The Supreme Court found it was not error for the trial court to consider the defendant's confession at sentencing. The Court found the *Miranda* warnings did not have to be given since the defendant was not under arrest, was free to leave, and was not in custody for purposes of *Miranda*. The Court found even if *Miranda* were applicable, its requirements were fully met.

Voluntariness (continued)

Mental capacity (continued)

The Supreme Court found the trial court did not err in finding the government had established by a preponderance that the defendant's confession was freely and voluntarily given. The only question was whether she possessed sufficient intelligence to legally give a confession.

Applies standard set forth in *State v. Adkins*, 289 S.E.2d 720, 727 (W.Va. 1982). (Found in Vol. I under this topic.)

State v. Nicholson, 328 S.E.2d 180 (1985) (Neely, C.J.)

The Supreme Court found the evidence did not clearly show a lack of capacity to understand the meaning and effect of her confession. The defendant was 25 and had recent experience with the criminal justice system. She had been advised of her rights in connection with her guilty pleas. The Supreme Court noted despite subnormal intelligence, the testimony indicated the defendant had learned from prior experiences. They found it may have been unwise for her to confess or even foolish, but they would not render an otherwise voluntary confession inadmissible.

Appellant was convicted of welfare fraud. He contends he was unable to give an intelligent waiver of his right to counsel and his right to remain silent during his interrogation at state police barracks due to his below-normal intelligence.

The Court found they have never held that below-normal intelligence, *ipso facto* invalidates a confession. The Court noted the fact that a citizen may be below average in intelligence or have received inadequate schooling means only that a law enforcement officer arresting him must be sensitive to that person's special needs before he allows him to waive the right to have a lawyer present during questioning.

The Court found they have repeatedly reiterated their holding in *State v. Hamrick*, 236 S.E.2d 247 (W.Va. 1977) that confessions elicited by law enforcement personnel from criminal suspects who because of mental condition, cannot knowledgeably and intelligently waive their rights are inadmissible.

Voluntariness (continued)

Mental capacity (continued)

State v. Nicholson, (continued)

The Court noted they have state a trial court, in dealing with a person of less than normal intelligence must be "cautious in determining whether the [suspect] could intelligently waive his right to counsel and make a voluntary statement", they have never strayed from the notion that the trial court's decision will not be disturbed unless plainly wrong.

Here, the Court found the appellant was slowly and carefully read his constitutional rights by the arresting officer who inquires, after each sentence, whether appellant understood those rights. The Court found the appellant stated that he did understand and admitted that he realized *what* was happening, if not precisely *why*. The Court also found there was no suggestion the appellant was vulnerable to intimidation and there was no evidence the appellant was under any pressure or was coerced to waive his rights or to make any statement. The Court also noted that, although no necessarily dispositive of the issue, the appellant was not inexperienced with the criminal justice system. The psychiatrist examining appellant stated appellant was competent to assist his attorney in the preparation of the defense and that appellant had a basic idea of the roles of the judge and jury.

The Court concluded the appellant intelligently waived his right to counsel and willingly gave his statement to the arresting authorities.

State v. Wyant, 328 S.E.2d 174 (1985) (Per Curiam)

Appellant was convicted of first degree murder. He contends the trial court erred in allowing the state to introduce into evidence his confession since he lacked the mental capacity to understand and waive his rights or to comprehend the meaning and effect of a confession.

Voluntariness (continued)

Mental capacity (continued)

State v. Wyant, (continued)

At the suppression hearing, appellant introduced into evidence the testimony of a clinical psychologist. The psychologist testified the appellant's scores indicated less than functional illiteracy and that the testing showed no evidence of personality or pathological disturbances. He also testified appellant was mentally capable of understanding the *Miranda* rights and of comprehending the meaning and effect of a confession.

The Court found they could not find that the trial court was clearly wrong in holding that the confession was freely and voluntarily given. The Court found appellant had sufficient intelligence to understand the constitutional rights which were repeatedly read an explained to him throughout the investigation. He signed the waiver form on three separate occasions and repeatedly told the interviewers that he wanted to cooperate in the investigation. At not time did he request an attorney. The Court found no evidence of coercion, threats or promises of leniency made during the interrogation to induce the appellant to confess.

Representations calculated to foment hope or despair

State v. Burgess, 329 S.E.2d 865 (1985) (Per Curiam)

Appellant was convicted of aggravated robbery. He contends the trial court erred in failing to suppress an inculpatory statement which he made prior to trial.

Five days after the robbery, appellant was arrested at his home for the offense. Upon arresting the appellant, the police searched him and read him his *Miranda* rights. They then placed him in a police car and began the trip to Logan. While enroute, the police asked the defendant if he had any information which might help them in the robbery case. Appellant made a response which indicated he had such information and also stated he did not want to talk about it at the time but would discuss it later. He asked the officers whether they could help him. The officers stated that while they had

State v. Burgess, (continued)

no authority to promise anything, "if he cooperated with us, it would look better in the eyes of the court and he could possibly get a lighter sentence." They also stated that "the only thing we could promise him was we could do what we could for him, as far as getting a low bond, talking to the magistrate, maybe talking to the judge later on, trying to help him out."

When they arrived at the Logan State Police barracks, the police again advised appellant of his *Miranda* rights and he signed a waiver of those rights. He then gave a confession which was typed and which he signed. Shortly thereafter he was arraigned.

Prior to trial, the trial court ruled the statement was admissible in evidence. The prosecution did not introduce the statement in its case in chief, but used it for impeachment when the appellant denied he had robbed the market.

Syl. pt. 1 - "When the representations of one in authority are calculated to foment hope or despair in the mind of the accused to any material degree, and a confession ensues, it cannot be deemed voluntary." Syllabus, *State v. Parsons*, 108 W.Va. 705, 152 S.E.2d 745 (1930).

The Court found the remarks in this case were designed to foment hope in the mind of the defendant and that the confession could not be deemed voluntary.

The State contends the statement was admissible for impeachment purposes under syl. pt. 1 of *State v. Goff*, 289 S.E.2d 473 (W.Va. 1982). The Court found syl. pt. 1 of *Goff* dealt with a confession that was rendered involuntary because the defendant's *Miranda* rights had been violated and that this rule was not applicable here since there was no *Miranda* violation. The Court found the confession was not a product of the defendant's freewill and should not have been admitted for any purpose.

Syl. pt. 2 - "A confession that has been found to be involuntary in the sense that it was not a product of the freewill of the defendant cannot be used by the State for any purpose at trial." Syllabus point 2, *State v. Goff*, 289 S.E.2d 473 (W.Va. 1982).

Voluntariness (continued)

Right to counsel

State v. Jackson, 298 S.E.2d 866 (1982) (Harshbarger, J.)

See SELF-INCRIMINATION - STATEMENTS BY DEFENDANT Statements to court-appointed psychiatrist, (p. 490) for discussion of topic.

State v. Louk, 301 S.E.2d 596 (1983) (Harshbarger, J.)

The defendant was tried for first degree murder and felonious assault. The police arrived immediately after the incident. The defendant was read her *Miranda* rights on the scene at approximately 4:00 p.m., and although she talked with the policemen, she insisted she wanted to ask her friend to get her a lawyer, and she refused to make a statement or sign anything. She was taken to police headquarters at 6:55 and signed a *Miranda* form indicating she did not want to speak with anyone at that time. At the magistrate hearing she said she was getting her own attorney. At the bond hearing, she informed the court a friend was getting a lawyer for her. After her return from court, but before her counsel arrived, she signed a waiver of rights and gave the police a statement. At the *in camera* hearing, she testified she got tired of the police asking her if she was going to give then a statement, so she gave them one.

State v. Easter, 305 S.E.2d 294 (1983) (Per Curiam)

Applying the standard set forth in *State v. McNeal*, 251 S.E.2d 484 (W.Va. 1978), the Supreme Court noted that no officer testified the defendant suggested or requested they take her statement, and that she was therefore entitled to a total abstention from questioning until she could talk with her lawyer. Her later waiver of counsel was ineffectual. The Supreme Court found our state constitution requires no less than a total cessation of police-defendant contact after an attorney has been requested. Officers must not talk to people about their cases after they indicate they want a lawyer.

Applies standard set forth in syl. pt. 1, *State v. McNeal*, 251 S.E.2d 484 (W.Va. 1978). (Found in Vol. I under this topic.)

Voluntariness (continued)

Right to counsel (continued)

State v. Easter, (continued)

Applies standard set forth in syl. pts. 1 and 3, *State v. Bradley*, 255 S.E.2d 356 (W.Va. 1979). (Found in Vol. I under this topic.)

In this case the appellant and Rathburn were believed by police to have been the last two people to see the victim alive. The police drove to appellant's house and asked him: whether he would be willing to submit to a polygraph. The appellant agreed. Upon arriving at the police barracks, the appellant was left waiting in a lobby while Rathburn was taken for a lie detector test. Before Rathburn took the test, he made incriminating statements implicating both appellant and himself. One of the troopers then handcuffed appellant to the chair and returned to question Rathburn. Shortly after, appellant was taken to a magistrate, charged and advised of his rights.

Although he checked a box on the magistrate's form indicating that he had already obtained counsel to represent him, the appellant did not have an attorney. According to testimony at the suppression hearing the appellant advised a magistrate that he would want or probably would want an attorney appointed for him. The magistrate testified that appellant did not say he wanted an attorney appointed at that time. The appellant did not file a pauper's affidavit.

The appellant was taken to the county jail to an interrogation room. One of the troopers testified he advised appellant of his rights and that appellant then signed a written form waiving his right and made a lengthy confession. No written waiver was introduced at trial. At 2 a.m. the following morning a trooper had the jailer bring appellant to a conference rom. There, appellant signed a waiver of rights form and made a one-page statement concerning what he did after the killing occurred. The trooper also interrogated appellant later that day and again appellant signed a waiver and made a brief statement relating to his actions after the homicide.

The Supreme Court found the critical factual question here is whether appellant requested an attorney when he was handcuffed to a chair at the State Police barracks. The Court noted that if he did, his confession and subsequent statements should have been suppressed.

Voluntariness (continued)

Right to counsel (continued)

State v. Easter, (continued)

The Court summarized the evidence finding that appellant testified during the suppression hearing that when he was handcuffed to a chair at the police barracks he told Trooper Totten he wanted to see a lawyer and the trooper responded by saying "well, sit here and keep your mouth shut then and don't say a word to nobody."

Trooper Totten did not testify during the suppression hearing. Trooper Blankenship testified that he could not recall any conversation at the time the handcuffs were placed on the appellant. When asked if there was any conversation between appellant and anyone else at that time, Trooper Blankenship responded no, not that he could remember, and that he knew he didn't say anything to him.

The Supreme Court concluded the trial court was clearly wrong in finding the preponderance of evidence supported a finding that appellant did not tell the troopers he wanted a lawyer at the State Police Barracks. Appellant said he told Trooper Totten he wanted a lawyer. Trooper Totten did not testify. The Supreme Court found Trooper Blankenship could only testify that he did not recall whether appellant asked for a lawyer, and he could not remember any conversation at all taking place at that point. The Court found appellant's testimony stood nearly unrefuted as no other witnesses testified on the point. Consequently the Supreme Court found the appellant requested an attorney while at the State Police Barracks. The Court found that as a matter of federal and state constitutional law, appellant was entitled to be free from custodial interrogation in the absence of counsel. The Court found appellant's confession and subsequent statements, being fruits of an illegal custodial interrogation initiated by police, were not admissible in evidence against him. The Court could not say this constitutional error was harmless beyond a reasonable doubt. Reversed and remanded.

State v. Simmons, 309 S.E.2d 89 (1983) (Miller, J.)

See SELF-INCRIMINATION - STATEMENTS BY DEFENDANT Voluntariness, Use in evidence, (p. 533) for discussion of topic.

Voluntariness (continued)

Right to counsel (continued)

State v. Green, 310 S.E.2d 488 (1983) (Per Curiam)

The appellant was convicted of sexual abuse in the first degree. Sgt. Wright sought out the appellant at his place of employment after learning the appellant's truck fit the description of the vehicle driven by the complainant's assailant. Sgt. Wright told the appellant in general terms the offense alleged to have been committed, informed the appellant of his rights and instructed him to accompany him to the police station for further questioning. There was no arrest warrant and appellant was not informed whether he was under arrest.

At the police station, the appellant, Sgt. Wright and Lt. Davis discussed the case in general terms for about twenty minutes. The appellant was then asked to read and sign a waiver of rights form he testified that he told Lt. Davis he should get an attorney, and that Lt. Davis replied "let's get this paperwork out of the way . . . The appellant signed the waiver, gave a statement in which he admitted having been with the alleged victim on the evening in question, but denied any sexual contact.

Between this statement ans a second statement the appellant attempted to contact his attorney numerous times. The police did not discontinue the interrogation.

Shortly between the second statement the appellant testified that Lt. Davis informed him the hospital lab reported that spermatozan had been found in the complainant's vagina and the appellant was "in a world of trouble". The officers asked if appellant executed a waiver. In the second statement the appellant admitted to having consensual sexual intercourse with the complainant.

The Supreme Court found that contrary to the trial court's apparent view for a request for counsel to be effective in terminating further interrogation such request must be accompanied by a manifestation of the desire that interrogation cease, prior decisions emphasize that termination of interrogation upon request of counsel is automatic and does not require further elaboration on the part of the accused.

Voluntariness (continued)

Right to counsel (continued)

State v. Green, (continued)

Applies standard set forth in syl. pt. 1, *State v. McNeal*, 251 S.E.2d 484 (W.Va. 1978). (Found in Vol. I under this topic.)

The Court found that police officers have an affirmative duty to secure counsel for an accused within a reasonable time after counsel has been requested.

Applies standard set forth in syl. pt. 1, *State v. Bradley*, 255 S.E.2d 356 (W.Va. 1979). (Found in Vol. I under this topic.)

The Court found that although interrogation must cease once an accused state unequivocally that he wants an attorney, they have recognized that, "where the defendant is equivocal in whether he desires to exercise his constitutional right to counsel, further questions may be asked in order to clarify his position." *State v. Clawson*, 270 S.E.2d 659 (W.Va. 1980).

The Supreme Court found the appellant's statement concerning his desire to speak to his attorney was made at both a logical and a critical juncture in the interrogation process and that Lt. Davis neither ceased questioning nor attempted to clarify the appellant's wishes. The Court found the Lieutenant had used diversionary tactics and despite the knowledge that appellant had tried to contact his attorney, the Lieutenant proceeded to solicit a second statement.

The Court found the denial of the appellant's right to counsel rendered his subsequent statements inadmissible.

Voluntariness (continued)

Right to counsel (continued)

State v. White, 301 S.E.2d 615 (1983) (Per Curiam)

Appellant was convicted of second degree murder. She was taken to police headquarters and upon arrival was read the standard rights form. Appellant contended that, in response to her request for a lawyer, she was told no lawyer would be available for three days. The officers who questioned her testified that she did not request a lawyer at anytime before or during her statement. The Supreme Court concluded, after a review of the *State v. White*, 301 S.E.2d 615 (W.Va. 1983) record, that the statement was made after the appellant had been fully informed of her rights and that it was completely voluntary. They found the appellant understood her rights and chose to waive them and make a statement.

State v. Wyer, 320 S.E.2d 92 (1984) (Miller, J.)

Appellant was convicted of sexual assault in the first degree. He contends trial counsel was ineffective because at the suppression hearing he failed to argue that the defendant's confession was taken in violation of his Sixth Amendment right to counsel. The Supreme Court found the precise issue presented is whether a written waiver of *Miranda* rights will suffice to waive the defendant's Sixth Amendment right to counsel once the defendant has been arrested, brought before a magistrate and has requested counsel.

Syl. pt. 3 - There is no per se rule against a waiver of the Sixth Amendment right to counsel. We do, however, hold that a waiver of the Sixth Amendment right to counsel should be judged by stricter standards than a waiver of the Fifth Amendment right to counsel. Furthermore, we do not equate a general request for counsel at the initial appearance before a magistrate as foreclosing in all cases the right of police officials to initiate a further discussion with the defendant to determine if he is willing to waive his Sixth Amendment right to counsel for purposes of procuring a confession.

SELF-INCRIMINATION - STATEMENTS BY DEFENDANT

Voluntariness (continued)

Right to counsel (continued)

State v. Wyer, (continued)

Syl. pt. 4 - Because of the higher standard against which the Sixth Amendment right-to-counsel waiver is measured, we hold that once the Sixth Amendment right to counsel has attached, it can only be waived by a waiver signed by the defendant. It must also be shown at the time that the waiver is executed that the defendant was aware that he was under arrest and had been informed of the nature of the charge against him. These elements must be shown in addition to the customary *Miranda* warnings.

Syl. pt. 5 - If at the time the waiver is sought, the defendant indicates his desire to have counsel to the interrogating officer, interrogation must cease until counsel is made available to him, unless the defendant initiates further communications with the police evidencing his desire to waive his Sixth Amendment right to counsel.

Here, appellate counsel filed a form purportedly signed by the defendant when he appeared before the magistrate after he was arrested. The form indicated appellant requested counsel be appointed. At the suppression hearing, the officer who took the confession testified that before taking the statement, he advised the appellant of his *Miranda* rights. He stated the appellant voluntarily executed a written waiver of those rights. The waiver was introduced at the suppression hearing. Whether the defendant had counsel appointed at the time the confession was taken was not developed by trial counsel.

The Supreme Court declined to analyze this assignment of error under the doctrine of ineffective assistance of counsel. Since the claim is one of constitutional dimension, they found they could under syl. pt. 18, of *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974), address the issue.

Voluntariness (continued)

Right to counsel (continued)

State v. Wyer, (continued)

Here, the Supreme Court found the defendant's signing of the magistrate's form indicating his desire for counsel was not presented to the circuit court. The form was attached to the defendant's appellate brief. The Court found the record is not factually developed on the circumstances surrounding the signing of the form and related matters. The Supreme Court remanded the case to permit the circuit court to hold an *in camera* hearing to determine whether, under the guidelines set forth in this opinion, the defendant waived his Sixth Amendment right to counsel.

State v. Angel, 319 S.E.2d 388 (1984) (Per Curiam)

Appellant contends the trial court should have suppressed evidence obtained as a result of conversations he had with police after he had requested an attorney. The Supreme Court found the record showed the appellant was neither under arrest nor in custody at the time these statements were made, and that although he did ask to talk with an attorney, he immediately withdrew this request and indicated his desire to cooperate.

The Court found because appellant recanted his request for counsel before counsel could be provided, there was no error in conducting the interrogation. The Court found it was also significant that the ensuing conversation was initiated by the appellant.

Farruggia v. Hedrick, 322 S.E.2d 42 (1984) (Neely, J.)

Petitioner was convicted of first degree arson. The State maintained the petitioner provided his co-conspirator, Mr. Gibson, with a can of kerosene and a promise of $500 to burn the house in question. Petitioner's petition for appeal was denied. In this habeas corpus action, the petitioner contends his Sixth Amendment right ti counsel was violated. Prior to his trial on the arson charges, the petitioner asked Mr. Gibson to accompany him to Beckley to

Voluntariness (continued)

Right to counsel (continued)

Farruggia v. Hedrick, (continued)

speak with the petitioner's attorney. Without petitioner's knowledge, Mr. Gibson was wired by the Raleigh County Sheriff's Department. The conversation in the automobile to Beckley and the conversation in the office of petitioner's lawyer was monitored and recorded. The tape was not played at petitioner's trial, but the prosecution pursued lines of questioning based on direct quotes from the tape and the tainted conversations were mentioned during cross examination of the petitioner. Even though the trial judge instructed the jury to disregard this testimony, the Supreme Court could not apply the harmless error rule since this evidence was taken in deliberate disregard for *Massiah v. United States*, 377 U.S. 201 (1964).

Syl. - The Sixth Amendment to the *Constitution of the United States* prohibits the use at trial of incriminating statements made by defendant to an accomplice after indictment and without the assistance of counsel when the accomplice was cooperating with the police and was equipped secretly to transmit and record the conversation.

The Supreme Court found *Massiah* has not been modified, reinterpreted, or even ignored in recent years and still stands as a rule to be rigidly enforced. The Court found Mr. Gibson had the charges dropped against him in exchange for his cooperation with the police and that the joint activity of Mr. Gibson and the police induced the petitioner's statements. The Court found the petitioner's remarks were "deliberately elicited" and therefore a violation of the petitioner's Sixth Amendment rights.

State v. Nicholson, 328 S.E.2d 180 (1985) (Neely, C.J.)

See SELF-INCRIMINATION - STATEMENTS BY DEFENDANT Voluntariness, Mental capacity, (p. 510) for discussion of topic.

SELF-INCRIMINATION - STATEMENTS BY DEFENDANT

Voluntariness (continued)

Statement prepared by officer in officer's handwriting

State v. Nicholson, 328 S.E.2d 180 (1985) (Neely, C.J.)

Appellant was convicted of welfare fraud. He contends the statement taken from him and prepared by a police officer in the officer's own handwriting was incomprehensible to him and, because it was taken by the arresting officer, should be, as a matter of law, inadmissible as evidence against him.

Syl. pt. 2 - A confession or statement made by a suspect is admissible if it is freely and voluntarily made despite the fact that it is written by an arresting officer if the confession or statement is read, translated (if necessary), signed by the accused and admitted by him to be correct.

Tactic admission by silence

State v. Howerton, 329 S.E.2d 874 (1985) (Miller, J.)

See SELF-INCRIMINATION - STATEMENT BY DEFENDANT Voluntariness, Under the influence of sodium amytal, (p. 523) for discussion of topic.

Under the influence of sodium amytal

State v. Howerton, 329 S.E.2d 874 (1985) (Miller, J.)

The defendant claims the trial court erred in admitting testimony concerning incriminating statements made while he was under the influence of sodium amytal. The test was conducted at the direction of defense counsel. The interview by a psychiatrist was taped and defendant obtained a copy. He thereafter played it at the home of an acquaintance. One of the persons hearing the tape testified at trial, over objection, as to his recollection of certain incriminating statements made on the tape.

The trial judge allowed the testimony to be admitted and indicated counsel should prepare some type of limiting instruction for the jury on this point. This was not done.

Voluntariness (continued)

Under the influence of sodium amytal (continued)

State v. Howerton, (continued)

The Court found courts have rather uniformly held that statements made by a criminal defendant under the influence of sodium amytal, a so-called "truth serum", are not admissible for the truth of the matters asserted therein, whether offered by the prosecutor or by the defense. The principle rationale for exclusion is that such tests have not been shown to have attained scientific acceptance as a reliable and accurate means of ascertaining truth or deception and that a related ground for excluding such evidence concerns the danger of suggestion by the physician or person administering the test.

The Court found the question here is whether the defendant's subsequent voluntary playing of the tape to a third party enables the third party to testify concerning the tape. The Court did not believe the trial court's basis for admitting the testimony on the theory it was a tactic admission by silence was entirely correct. The Court noted his theory is premised on the fact that some accusation is made in the presence of and directed at the defendant which would ordinarily call for a denial or a response and the defendant remains silent.

The Court found a related and more appropriate basis is that of an adoptive admission where the party by words or conduct signified his acquiescence or approval of an out-of-court statement. This frequently comes into play where there is a conversation with the defendant in which the defendant agrees with the remarks of the other party. It is utilized with some caution.

Syl. pt. 5 - An adoptive admission is where a party by words or conduct signifies his acquiescence or approval of an out-of-court statement.

The Court found here the defendant verbally indicated to the witness the tape was a tape of his conversation and it was recorded while he was under truth serum, and, from an adoptive standpoint, that the defendant produced and played the tape voluntarily at the home of an acquaintance without any prior urging on the part of the witness or anyone else. The Court also found the statement recalled by the witness from the defendant's tape bore rather substantial indicia of trustworthiness by the evidence adduced at trial.

Voluntariness (continued)

Under the influence of sodium amytal (continued)

State v. Howerton, (continued)

The Court found to some extent, the issue raised is analogous to our well established law that permits the introduction of an incriminating statement made by a defendant when he is not in custody or being interrogated by law enforcement officials, as set out in syl. pt. 1 of *State v. Johnson*, 226 S.E.2d 442 (W.Va. 1976):

> "A spontaneous statement by a defendant made prior to an action by a police officer and before an accusation, arrest or custodial interrogation is made or undertaken by the police may be admitted into evidence without the voluntariness thereof first having been determined in an *in camera* hearing."

The Court found under the facts if this case, the defendant's actions in playing his tape constituted an adoptive admission.

Unreasonable delay in taking before magistrate

State v. Mays, 307 S.E.2d 655 (1983) (Neely, J.)

In this case of murder for hire, the police investigation eventually led to the appellant. The police dispatched one officer to obtain a warrant for the arrest of the appellant while two other officers waited outside the house to make sure the appellant did not escape.

The appellant left the house at 11:40 p.m. One of the officers took him into custody because they feared he would flee into Ohio. While appellant was not formally arrested, he was told that the officers had questions for him regarding the death and he was given proper *Miranda* warnings. Appellant stated he understood his rights and was willing to discuss the matter. He was taken to the police station where interrogation continued until 1:00 a.m.

Voluntariness (continued)

Unreasonable delay in taking before magistrate (continued)

State v. Mays, (continued)

By 1:00 a.m. the police had obtained a warrant for appellant but found his denial credible and believed that probable cause for arrest was "slipping away." They continued their interrogation without serving the warrant until about 2:20 a.m. at which point appellant requested a polygraph test. At 4:40 a.m., before any polygraph test was administered, appellant confessed to the killing. A stenographer was summoned and appellant signed a transcript of an interview with police officers confessing to the crime at approximately 7:00 a.m. At 9:00 a.m. he was presented to a magistrate and the warrant was served upon him. While being taken to a magistrate he directed police to various pieces of principal evidence which were later used at the trial.

In *Dunaway v. New York*, 442 U.S. 200 (1979), the Supreme Court held that a confession obtained pursuant to an illegal arrest violated the Fourth Amendment irrespective of *Miranda* warnings.

In deciding whether a confession obtained after an improper seizure should be excluded from trial, courts were to consider the totality of circumstances surrounding the arrest.

The State Supreme Court found that West Virginia adopted a similar approach to confessions resulting from illegal arrest in *State v. Stanley*, 284 S.E.2d 367 (W.Va. 1981). In that case, it was held that a confession obtained by exploitation of an illegal arrest was inadmissible despite *Miranda* warnings. In determining whether the casual link between the arrest and temporal proximity of the arrest to the confession, the presence of intervening circumstances and the flagrancy of police misconduct.

However, the Supreme Court found this precedent did not control in this case. Here, the police seized appellant because they were properly concerned that he might flee. This constituted an exigent circumstance.

Voluntariness (continued)

Unreasonable delay in taking before magistrate (continued)

State v. Mays, (continued)

In *Michigan v. Summers*, 452 U.S. 692 (1981), the Supreme Court held that it was reasonable to detain a man while a search warrant for his house was being obtained. This "limited intrusion on the personal security" of a suspect was justified by "substantial law enforcement interests" in assuring that suspects do not escape. *Id.* At 699.

More recently, the U.S. Supreme Court has noted: "[L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen . . .". *Florida v. Royer*, 103 S.Ct. 1319, 1324 (1983). The State Supreme Court thus found: the police were acting responsibly and legally in initially confronting appellant. Furthermore, the Court noted the ability of the police to obtain a warrant for appellant's arrest, despite the fact that it was not executed, indicated that an impartial judicial officer did believe that probable cause existed at the time of the initial seizure.

The Supreme Court has no quarrel with the police conduct up to the time appellant was taken to police headquarters. At that point, "what had begun as a consensual inquiry in a public place has escalated into an investigatory procedure in a police interrogation room . . .". *Florida v. Royer*, at 1327. The Court found the appellant had not been told that he was free to leave if he chose and was under *de facto* arrest.

Under *W.Va. Code* 62-1-5 an individual under arrest must be presented to a magistrate without unnecessary delay. Delay in taking a defendant to a magistrate may be a critical factor in determining the admissibility of a confession when it appears that the primary purpose of the delay was to obtain a confession.

Syl. pt. 2 - Limited police investigatory interrogations are allowable when the suspect is expressly informed that he is not under arrest, is not obligated to answer questions and is free to go.

Voluntariness (continued)

Unreasonable delay in taking before magistrate (continued)

State v. Mays, (continued)

The Supreme Court found that by establishing a clear rule that police investigatory interrogations without presentment to a magistrate are allowable only when the suspect is expressly informed that he is not under arrest, is not obligated to answer any questions and is free to go, they hoped to establish a system sufficiently flexible that the innocent are allowed to prove their blamelessness and the police are able effectively and legally to interrogate those who are ultimately proven guilty.

The Court continued to embrace the rule of *State v. Stanley, supra*, that confessions obtained through the exploitation of illegal arrests are inadmissible. They also reaffirmed the mandatory nature of *W.Va. Code* 62-1-5 [1965] requiring presentment to a magistrate within a reasonable time after arrest. In this case, the Court extended the force of those rulings to cases in which a formal arrest is not made, but the suspect is effectively deprived of his liberty. Therefore, the Court reversed this case because of the unreasonable delay between the appellant's seizure (which had all the elements of a lawful arrest, including the possession of a valid warrant) and his presentment before a magistrate. The Court concluded the confession given by the appellant and any poisonous fruits of that confession itself was a direct result of prolonged, illegal custodial interrogation.

State v. Guthrie, 315 S.E.2d 397 (1984) (Harshbarger, J.)

The appellant was arrested on a Va. fugitive warrant. The issue here is whether an arrestee upon a fugitive warrant in Va. for a crime allegedly committed in W.Va. He contends the offices had probable cause to arrest so that pre-presentment interrogation was unnecessary, and the only reason he was not presented was to get him to confess.

The Supreme Court noted that our State prompt presentment rule has been interpreted to proscribe delays in presentment, the sole purpose of which is to obtain a confession. The Court noted that they stated in *State v. Persinger*, 286 S.E.2d 261 (W.Va. 1982), that an unjustifiable and unreasonable delay in presenting the accused to a magistrate after arrest may alone be enough to

Voluntariness (continued)

Unreasonable delay in taking before magistrate (continued)

State v. Guthrie, (continued)

render a confession involuntarily, and that the purpose, not the length of delay, affects the admissibility of a confession. The Supreme Court also cites *State v. Mitter*, 289 S.E.2d 457 (W.Va. 1982) noting that after Mitters first confession, police had probable cause to arrest him and should have presented him to a magistrate then.

(In footnote 7, the Court notes that in *State v. Wilson*, 294 S.E.2d 296 (W.Va. 1982), they affirmed the admission of defendant's confession despite a delay in presentment. There they explained that a probable cause determination had been made when the arrest warrant was issued and defendant had been informed of his rights, the two things prompt presentment was intended to guarantee. The Court noted that the facts in *Wilson* coincide with the facts here. There was probable cause to arrest, Guthrie was informed of his rights, and there were no assertions of third-degree tactics or lengthy late-night interrogation, no promises, threats or improper inducements. The Court noted that if *Wilson* is correctly decided, it could be authority for admission of Guthrie's confession in W.Va. They, however, would not apply it here.)

The Supreme Court found that *Persinger* and *Mitter* show that the confession here is inadmissible. They found the delay was unjustifiable and that makes it involuntary. The Court found the rationale that justifies refusing to admit a confession under circumstances where a defendant was questioned at the police station rather than taken to a neutral magistrate for an explanation of his rights, the charges against him and the mechanisms for acquiring bail, is that a confession elicited under those circumstanced is inherently unreliable or suspect. The Court found they could use the prompt presentment statute as an indication of the parameters of acceptable police behavior, but the true inquiry is into the trustworthiness of the confession.

The Supreme Court found the defendant could easily have been presented to a magistrate, advised of his rights, informed of the charges, and his state of intoxication could have been assessed. The Court found this was not a question of extra territorial application of our prompt presentment rule since the defendant was being tried in West Virginia for a crime he allegedly committed in West Virginia.

Voluntariness (continued)

Unreasonable delay in taking before magistrate (continued)

State v. Guthrie, (continued)

The Supreme Court found an analogy between this case and controversies about the admissibility of confessions in federal courts where state authorities improperly delayed presentation of defendant's to magistrates in contravention of federal rules. The Court noted the unusual rule is that delays by State officials will not foreclose admission of the confession in federal courts (cites omitted) unless a "working arrangement" between federal and state officials is provable then federal officers can be held accountable for delays brought about by state authorities. *Anderson v. United States*, 318 U.S. 350 (1943).

The Supreme Court found that here W.Va. and Va. police worked together to find and arrest the defendant, and that Va.'s only involvement was her fugitive warrant predicated on a crime committed in W.Va. The Court found that all times during arrest, questioning, processing and presentment the Va. officers were accompanied by W.Va. authorities. The Supreme Court found the defendant's delay was prompted by our officers and the untimely interrogation was conducted by them. The Court found if the federal rules were applicable, this would be a case that fit neatly into the narrow "working arrangement" exception.

The Supreme Court found West Virginia officers may not avoid our State rules about prompt presentment of arrestees and admissibility of confessions when they cross our borders to apprehend a fugitive criminal suspect. The Court found the tangential involvement of Va. police in the arrest process in the defendant's case did not obviate the requirement that our officers follow the law. The Court concluded the defendant's confession was inadmissible.

See INSTRUCTIONS Prompt presentment to magistrate, (p. 307) for discussion of topic.

Voluntariness (continued)

Unreasonable delay in taking before magistrate (continued)

State v. Taylor, 324 S.E.2d 367 (1984) (Per Curiam)

Appellant contends the trial court erred in failing to suppress his confessions since he was under arrest and should have been taken to a magistrate prior to the interrogations. The Supreme Court found the trial court found the appellant was not under arrest and there was no reason to disturb that finding. See SELF-INCRIMINATION - STATEMENTS BY DEFENDANT Voluntariness, Violation of *Miranda*, (p. 533) for discussion of topic.

State v. Hall, 328 S.E.2d 206 (1985) (Miller, J.)

Appellant was convicted of second degree murder and unlawful wounding. On appeal he contends there was unreasonable delay in presenting him to a magistrate.

The Court found that after arresting the defendant at the scene of the crime, the officers transported him to the courthouse. Since the crime was committed late at night, the arresting officers radioed to have a magistrate appear for purposes of a preliminary arraignment. They did not arrive at the courthouse until almost 1 a.m. The defendant was taken to the sheriff's office where he signed a written *Miranda* waiver at about 1:15 a.m. Immediately thereafter the defendant gave a confession which was almost completely reduced to writing by the time the magistrate arrived at his office in the courthouse. Within a few minutes of the magistrate's arrival, the defendant was brought before him. The Court did not find an unwarranted delay in presenting the defendant to the magistrate.

State v. Wyant, 328 S.E.2d 174 (1985) (Per Curiam)

Appellant was convicted of first degree murder. On appeal he contends his confession was inadmissible because of the delay in taking him before a magistrate as required by *W.Va. Code* §62-1-5 (1984 Replacement Vol.). The delay complained of was occasioned by the taking of a written statement from

Voluntariness (continued)

State v. Wyant, (continued)

the appellant following his oral confession. The Court found that since the appellant expresses difficulty in reading and writing, the trooper elected to transcribe the appellant's answers to his questions. The trooper then went back over the six-page statement line by line, reading the appellant each question and answer and having the appellant initial each answer before signing the entire statement. The entire process was completed approximately two and one half hours after it had begun. The appellant was then fingerprinted, photographed and then arraigned.

The Court found that here it did not appear that the purpose of the delay in presentment was to obtain the appellant's confession. The Court found there was no probable cause to arrest the appellant until he confessed and that the purpose of the delay was to record the appellant's statement. The Court found the procedure used by the arresting officers was tedious and time-consuming and is not favored by the Court, but that in view of all the circumstances, they did not believe the delay in presentment was so unreasonable or unjustified as to require suppression of the confession.

State v. Manns, 329 S.E.2d 865 (1985) (Miller, J.)

Appellant contends there was an unreasonable delay in presenting him to a W.Va. magistrate upon his extradition back to this State and that consequently, the confession he gave was inadmissible. The Court found our prompt presentment cases are based on statutory grounds and are not of a constitutional dimension. The defendant failed to raise this objection below and, as a result, the Court declined to address it on appeal. The Court found the general rule is that nonjurisdictional trial error not raised in the trial court will not be addressed on appeal.

Use in evidence

State v. Williams, 301 S.E.2d 187 (1983) (Neely, J.)

See SELF-INCRIMINATION - STATEMENTS BY DEFENDANT Voluntariness, Waiver, (p. 535) for discussion of topic.

Voluntariness (continued)

Use in evidence (continued)

State v. Simmons, 309 S.E.2d 89 (1983) (Miller, J.)

About two or three hours after the homicide, the defendant, who had been arrested, gave a statement to the police. Before the trial, the circuit court ruled the statement was voluntarily given, but would be inadmissible at trial because the statement was given after the defendant had requested the presence of a lawyer, which violated her Fifth and Sixth Amendment rights. After the defendant had testified, the State sough to have the tape of the statement played before the jury in order to impeach the defendant's testimony. The trial court agreed that this would be proper impeachment under syl. pt. 4, of *State v. Goodman*, 290 S.E.2d 260 (W.Va. 1981). (Found in Vol. I under this topic.) The trial court, upon defendant's request, gave a cautionary instruction to the jury after the tape was played, instructing it to consider the statement for impeachment purposes only. The defendant contended the State played the tape not to impeach but to demonstrate her mental capacity, and that the statement did not contradict the defendant's testimony and therefore was not proper impeachment.

The Supreme Court found it was clear from the record that the State's purpose in presenting the statement was to impeach the defendant, and that a comparison of the defendant's testimony with the statement revealed numerous contradictions and inconsistencies. The Supreme Court found no error in allowing the statement to be played to the jury.

Violation of *Miranda* rights

State v. Jackson, 298 S.E.2d 866 (1982) (Harshbarger, J.)

See SELF-INCRIMINATION - STATEMENTS BY DEFENDANT Statements to court-appointed psychiatrists, (p. 490) for discussion of topic.

Voluntariness (continued)

Violation of *Miranda* rights (continued)

State v. Gum, 309 S.E.2d 32 (1983) (McGraw, C.J.)

Appellant was convicted of first degree murder. On appeal he alleged the court erred in failing to suppress certain statements he made to police officers investigating the death. He argues the failure of the officers to give him his *Miranda* warnings tainted both the initial and subsequent conversations with the appellant, making any information obtained through those conversations inadmissible at trial.

"The obligation of police to warn a suspect of both his rights to counsel and his right against self-incrimination applies only to custodial or other settings where there is a possibility of coercion syl. pt. 2, *State v. Andriotto*, 280 S.E.2d 131 (W.Va. 1981).

The Supreme Court found the informal questioning which took place in this case as part of the preliminary investigation of the victim's death did not take place in a custodial or coercive setting. Therefore, there was no duty to give the appellant his *Miranda* warnings, and the information elicited was admissible at trial.

State v. Chesire, 313 S.E.2d 61 (1984) (Per Curiam)

See SELF-INCRIMINATION - STATEMENTS BY DEFENDANT Voluntariness, mental capacity, (p. 508) for discussion of topic.

State v. Taylor, 324 S.E.2d 367 (1985) (Per Curiam)

Appellant contends his confession should have been suppressed because the *Miranda* warnings were defective and confusing. The rights form was read to the appellant five times in its entirety. Each time it was read, the chief of police told the appellant that number 5, the right to be taken immediately to a magistrate, did not apply because the appellant was not under arrest. The chief of police placed an "x" in front of the number 5 and number 6, the right to refuse to answer any questions or make a statement and be taken before a magistrate immediately.

Voluntariness (continued)

Violation of *Miranda* rights (continued)

State v. Taylor, (continued)

The trial court found and the Supreme Court agreed, that at the time of the interrogations, the appellant was not under arrest and had no right to be taken to a magistrate. In one of the statements, the appellant stated he understood he was not under arrest and was free to leave. The Court found his testimony at the suppression hearing revealed that the entire litany of rights was read to him by the police chief, who told him that the right to see a magistrate did not apply. The Court found an examination of appellant's testimony revealed that he was not confused about the nature and extent of his rights. The Court found, under these circumstances, the alteration of the *Miranda* form was not improper.

Waiver

State v. Jackson, 298 S.E.2d 866 (1982) (Harshbarger, J.)

See SELF-INCRIMINATION - STATEMENTS BY DEFENDANT Statements to court-appointed psychiatrist, (p. 490) for discussion of topic.

State v. Williams, 301 S.E.2d 187 (1983) (Neely, J.)

Reversing on the admission of confessions into evidence, the Supreme Court found it did not need to reach any further issues in the case. They were, however, concerned with the trial court's refusal to permit the appellant to introduce a sixth, previously suppressed, confession into evidence. In this confession the appellant confessed to raping the victim, a rape which the evidence indicated never took place. The Supreme Court noted that while the confession was deemed inadmissible for the purpose of proving the guilt of the accused, it was not *per se* inadmissible.

SELF-INCRIMINATION - STATEMENTS BY DEFENDANT

Voluntariness (continued)

Waiver (continued)

State v. Williams, (continued)

The Supreme Court noted that the constitutional right to have a tainted statement or confession suppressed is a natural outgrowth of a defendant's right to constitutional police conduct, and is personal to the defendant. Accordingly, since a defendant may knowingly and intelligently waive a constitutional right, it is only logical to infer that he may waive the sanction of inadmissibility and demand that an otherwise inadmissible statement be introduced into evidence. The Court noted that this does not mean the defendant may selectively introduce parts of otherwise suppressed statements in order to deliberately create a false impression in the minds of jurors.

Here, the court noted that there was no record of any theory being intelligently advanced by the appellant which made the evidence vital to the case, and, the only likely purpose of introducing the sixth confessions which were rendered inadmissible in this appeal. The argument was therefore rendered moot.

Who determines

State v. Sparks, 298 S.E.2d 857 (1982) (Per Curiam)

The appellant contended that the trial court erred in refusing his instruction on the voluntariness of his confession. The record revealed that the State's primary objection to this instruction was that it went beyond the scope of the evidence. Defense counsel apparently did not offer another instruction, nor did he offer to amend the first one. As a result, no instruction on the voluntariness of the appellant's statement was given to the jury.

The Supreme Court would not attempt to determine whether the proffered instruction correctly stated the law, because it was clear that it referred to circumstances which were not presented by the evidence. The Court has consistently held that instructions which are not supported by the evidence are erroneous and should be refused. The Court concluded the trial court properly refused the instruction as offered.

Voluntariness (continued)

Who determines (continued)

State v. Sparks, (continued)

The appellant further contended that the trial court must, in accordance with *State v. Vance*, 250 S.E.2d 146 (W.Va. 1978), give an instruction similar to the one proffered by defense counsel. The Supreme Court found that in *Vance*, no instruction was submitted by the defense and none was given by the Court. It was noted in *Vance*, that "as a general rule trial courts have no duty to give instructions *sua sponte* on collateral issues not involving an element of the offense being tried" and the trial court did not commit reversible error by failing to submit the voluntariness issue to the jury on its own motion.

In this case, the Supreme Court found that the appellant did not offer another instruction, nor did he seek to amend the one that was refused. As a result, he effectively offered no instruction. The Supreme Court found it was not error for the trial judge not to give a voluntariness instruction on his own after properly refusing the appellant's instruction.

SELF-REPRESENTATION

See RIGHT TO COUNSEL Waiver of, (p. 449) for discussion of topic.

In general

State v. Sheppard, 310 S.E.2d 173 (1983) (McGraw, C.J.)

Appellant was represented by court appointed counsel. He contended the trial court erred in refusing to allow him to represent himself. On the first day of the trial at an *in camera* hearing held prior to jury selection the appellant raised objections to his court appointed counsel and stated he would prefer to represent himself. He refused, however, to waive his right to assistance of counsel. The trial court refused to dismiss the appellant's court appointed attorneys or to allow the appellant to defend without the assistance of counsel.

The Supreme Court found it has long been recognized in this jurisdiction that an accused has a constitutional right to defend himself in a criminal proceeding without the assistance of counsel.

Syl. pt. 7 - The right to self-representation is a correlative of the right to assistance of counsel guaranteed by article III, section 14 of the West Virginia Constitution.

The Court noted that in *Faretta v. California*, 422 U.S. 806 (1975), the U.S. Supreme Court held that the refusal of the trial court to permit a defendant to represent himself without the assistance of counsel constituted a denial of an accused's independent right of self-representation, which is implied in the structure of the 6th amendment and is applicable to criminal defendants in state courts through the 14th amendment. The Court noted the *Faretta* decision recognized the right is a qualified right and its exercise is subject to reasonable restrictions designed to protect the accused and insure the orderly administration of the judicial process.

The Supreme Court noted the defendant must make a timely and unequivocal assertion of the right to be entitled to self-representation, and that the trail court is not required to, *sua sponte*, advise the accused of this right.

SELF-REPRESENTATION

In general (continued)

State v. Sheppard, (continued)

The Supreme Court found that once the defendant properly asserted this right, the trial court must determine whether the defendant has knowingly and intelligently elected to proceed *pro se.* The test is whether the defendant knows of the dangers and clearly wants to waive the rights he relinquishes by so proceeding.

The trial court must conduct an *in camera* inquiry, on the record, advising the accused of his rights and the possible consequences, and the trial court must determine whether the defendant understands and is still willing to relinquish his right, and if the defendant is aware of the charges and possible penalties. The Supreme Court noted the defendant must be told of the disadvantages of proceeding *pro se*, that he or she will be subject to all the technical rules of procedural, substantive and evidentiary law, that the State will be represented by an attorney, that he or she cannot claim ineffective assistance and that misbehavior or disruption could vacate the right. The trial court is to consider the accused's background, education and experience with the judicial system to determine the accused's capacity to appreciate the consequences of his or her decision.

The Court noted, citing *Faretta*, that the technical legal knowledge of a defendant who wishes to proceed *pro se* is not relevant to the question of whether his decision was intelligently and knowingly made.

Syl. pt. 8 - A defendant in a criminal proceeding who is mentally competent and *sui juris*, has a constitutional right to appear and defend in person without the assistance of counsel, provided that (1) he voices his desires to represent himself in a timely and unequivocal manner; (2) he elects to do so with full knowledge and understanding of his rights and of the risks involved in self-representation; and (3) he exercises the right in a manner which does not disrupt or create undue delay at trial.

In this case, the Supreme Court found the trial court did not err in requiring the appellant to be represented at trial by his court-appointed attorneys. The Court had some question as to whether the demand was made in a timely manner. The request was tendered the morning of the trial. The Supreme Court noted that as a general rule, where the request to defend without the

State v. Sheppard, (continued)

assistance of counsel is made in the first instance an the morning of the trial, the defendant's right to appear and defend in person is ordinarily a matter within the discretion of the trial court. The Supreme Court could not say the trial court abused its discretion.

The Court also found that the request could not be characterized, in this case, as an unequivocal demand. The defendant stated he wished to represent himself at trial, but also clearly indicated he had no intention of waiving his right to the assistance of counsel. The Court noted the defendant's demand to defend *pro se* appeared to have resulted more from the court's denial of his request for appointment of other counsel than from any genuine desire to represent himself without assistance. The Court found no error in the refusal to allow the defendant to defend himself at trial.

The appellant contended the trial court erred in failing to conduct an extensive inquiry into the issue. The Supreme Court noted it has been held that where a defendant does not make a timely and unequivocal demand to exercise the right of self-representation, the trial court need not conduct a detailed hearing on the issue of whether the demand was knowingly and intelligently made. *Russell v. State*, 270 Ind. 55, 383 N.E. 2d 309 (1978). *State v. Burgin*, 539 S.W. 2d 652 (Mo. App. 1976).

The appellant contended his right of self-representation was infringed by the trial court's refusal to permit him to act as co-counsel. The Supreme Court found that while the defendant has a constitutional right to represent himself without the assistance of counsel, he is not entitled as a matter of right to appear as co-counsel. The right of accused who is represented by counsel to participate personally in his defense by examining witnesses or addressing the jury is generally a matter of discretion for the trial court. The Supreme Court found no abuse of discretion here. The Court did not find error in the trial court's refusal to allow the appellant to dictate the conditions under which he would address the jury.

SELF-REPRESENTATION

In general (continued)

State v. Sheppard, (continued)

The appellant contended the trial court erred in permitting the appellant to dismiss the defense witnesses when it was decided that the appellant would not be permitted to speak to the jury. The Supreme Court found after the trial court denied the appellant's request, the judge again warned the appellant against dismissing the defense witnesses. The appellant adamantly refused to allow his attorneys to put on a defense for him. In view of this, the Court found no error in the trial court's decision to allow the appellant to dismiss the defense witnesses.

See RIGHT TO COUNSEL Waiver of, (p. 449) for discussion of topic.

SENTENCING

Appeal

State v. Boham, 317 S.E.2d 501 (1984) (Miller, J.)

See SENTENCING Retrial, (p. 545) for discussion of topic.

Appropriateness of the sentence

State v. Buck, 314 S.E.2d 406 (1984) (Miller, J.)

See ROBBERY Sentencing, Review of sentence, (p. 454) for discussion of topic.

Credit for time spent on separate conviction

Miller v. Luff, 332 S.E.2d 111 (1985) (Brotherton, J.)

See SENTENCING Cumulative/consecutive, (p. 542) for discussion of topic.

Cumulative/consecutive

Miller v. Luff, 332 S.E.2d 111 (1985) (Brotherton, J.)

Petitioner was convicted of arson upon guilty plea in Harrison County and disinterment of a dead body following a jury trial in Taylor County. He asks the Supreme Court to compel the Circuit Court of Taylor County to grant him credit against his current sentence for time served on the sentence imposed by the Circuit Court of Harrison County. Petitioner contends the two sentences would have run concurrently had he not appealed the Taylor County sentence. He contends the denial of credit converted concurrent sentences to consecutive sentences and that this result discourages the exercise of a defendant's right to appeal.

Cumulative/consecutive (continued)

Miller v. Luff, (continued)

The Court found neither sentencing court had occasion to specify whether the sentence imposed by it was to be concurrent with or cumulative to the other sentence. The Court found at a minimum, the trial court imposing the second sentence has the power to make it cumulative to the sentence already imposed. The Court found the trial court on resentencing intended that he disinterment sentence be served in addition to the arson sentence. The Court could not accept petitioner's assertion that the sentences for arson and disinterment would have been concurrent but for his appeal.

The petitioner also alleged he was entitled to credit on his current sentence for the time served pursuant to his conviction for a separate crime.

The defendant is not entitled to credit for time served on a conviction for a related offense where he was released from the first confinement prior to final imposition of the sentence for the second conviction.

The Court denied the writ.

Disparate sentences

State v. Cooper, 304 S.E.2d 851 (1983) (Harshbarger, J.)

See PROPORTIONALITY Disparate sentences, (p. 425) for discussion of topic.

State v. Buck, 314 S.E.2d 406 (1984) (Miller, J.)

See ROBBERY Sentencing, Review of sentence, (p. 454) for discussion of topic.

SENTENCING

Error

State v. Williams, 305 S.E.2d 251 (1983) (McGraw, C.J.)

See DOUBLE JEOPARDY Same offense, (p. 133) for discussion of topic.

Matters considered not brought out on the record

State v. Maxwell, 328 S.E.2d 506 (1985) (Brotherton, J.)

Appellant was convicted of drug related offenses. He claims he was denied due process because matters were considered during his sentencing hearing which were not brought out on the record. Witnesses for and against appellant were heard before the trial court denied his motion for probation. However, the trial judge placed considerable weight on an incident not brought out by any of the witnesses either in the sentencing hearing or at trial, nor was it found anywhere in the presentencing report. The incident was apparently made known to the court outside the sentencing proceeding.

Syl. pt. 3 - Any facts which would have a bearing on the sentencing should be brought out in the presentence report or by witnesses called in open court, in the presence of the defendant, so that the defendant has an opportunity to refute any derogatory statements and to cross-examine the witnesses.

The Court found since there was prejudicial error in the sentencing hearing, the sentence should be vacated. The Court remanded for a new sentencing hearing.

Resentencing

State v. Oldaker, 304 S.E.2d 843 (1983) (Harshbarger, J.)

See RECEIVING STOLEN GOODS Elements of the offense, (p. 440) for discussion of topic.

SENTENCING

Retrial

State v. Bonham, 317 S.E.2d 501 (1984) (Miller, J.)

Appellant was tried in municipal court for driving while under the influence of alcohol and was fined one hundred dollars. He exercised his right to an appeal *de novo* to the circuit court and was there found guilty and sentenced to a more severe sentence.

The appellant contended the circuit court was precluded by *State v. Eden*, 256 S.E.2d 868 (W.Va. 1979) from: imposing a more severe sentence than imposed by the municipal court. The Supreme Court agreed.

Syl. pt. 1 - "The provisions of the Constitution of the state of West Virginia may, in certain instances, require higher standards of protection than afforded by the Federal Constitution." Syllabus point 2, *Pauley v. Kelly*, 255 S.E.2d 859 (W.Va. 1979).

Syl. pt. 2 - A defendant who is convicted of an offense in a trial before a magistrate or in municipal court and exercised his statutory right to obtain a trial *de novo* in the circuit court is denied due process when, upon conviction at his second trial, the sentencing judge imposes a heavier penalty than the original sentence. *W.Va. Const.* art. III, § 10.

The Court noted that in Eden, they explicitly rejected the United States Supreme Court's holding in *Colten v. Kentucky*, 407 U.S. 104, that a more severe sentence imposed following a trial *de novo* does violate a defendant's due process rights.

The Court concluded that syl. pt. 2 of *Eden*, should be reaffirmed and modified to include municipal courts.

SENTENCING

Review of sentence

State v. Bennett, 304 S.E.2d 28 (1983) (Per Curiam)

The appellant alleged the trial court "abused and misused" *W.Va. Code* 61-11-16 (1941) by recommending that he serve three years of his one to five year sentence. He contended that nothing in his record justified the recommendation and that the trial judge made no finding of fact or conclusions of law, thereby precluding any review of whether he abused his discretion.

"Sentences imposed by the trial court, if within statutory limits and if not based on some unpermissible factor, are not subject to appellate review." Syl. pt. 4, *State v. Goodnight*, 287 S.E.2d 504 (W.Va. 1982).

The Supreme Court found the appellant's sentence was clearly within the statutory guidelines and found no evidence that the court's recommendation was based on an impermissible factor.

Suspension of sentence

Sattler v. Holliday, 318 S.E.2d 50 (1984) (Harshbarger, J.)

Syl. pt. 2 - A circuit judge may suspend a sentence when he is convinced that an offender's character and crime do not indicate a likelihood of repetition.

Syl. pt. 3 - A court cannot make a proper assessment of an offender's character and likelihood of recidivism for purposes of suspending sentence without a pre-sentence report.

Citing *W.Va. Code* 62-12-3, the Supreme Court found the trial court lost jurisdiction to suspend the sentence in this case.

Transfer outside state of West Virginia

Ray v. McCoy, 321 S.E.2d 90 (1984) (Neely, J.)

See TRANSPORTATION CLAUSE In general, (p. 569) for discussion of topic.

SEXUAL ASSAULT

Double jeopardy

See DOUBLE JEOPARDY Sexual assault, (p. 136) for discussion of topic.

Abduction/sexual assault

State v. Trail, 328 S.E.2d 671 (1985) (Brotherton, J.)

See DOUBLE JEOPARDY Abduction/sexual assault, (p. 126) for discussion of topic.

Evidence of age

State v. Richey, 298 S.E.2d 879 (1982) (Miller, C.J.)

The appellant argued that the trial court erred in denying his motion for a directed verdict because the State failed to prove the defendant's exact age. The Supreme Court found that the exact age of the defendant is not an essential element of the crime of third degree sexual assault. Under Code 61-8B-5, the elements of the offense are that the defendant must be over sixteen years of age and at least four years older than the victim who must be less than sixteen years of age. The State's proof was that the victim was under sixteen years of age being of the age of fourteen. It was also shown that the defendant was a member of the W.Va. House of Delegates and that the minimum age for membership for that position is eighteen. The victim testified that he believed the defendant's age to be between forty and fifty. The State also argued that the defendant was present in the courtroom and the jury had the opportunity to evaluate his age.

Syl. pt. 6 - Where the exact age is not required to be proved, the defendant's physical appearance may be considered by the jury in determining age but there must be some additional evidence suggesting the defendant's age.

The Supreme Court found that although the State was rather careless in presenting evidence on the age element, there was sufficient evidence to carry the question to the jury and consequently there was no error.

SEXUAL ASSAULT

Evidence of collateral misconduct

State v. Pancake, 296 S.E.2d 37 (1982) (Harshbarger, J.)

See EVIDENCE Collateral crimes, (p. 158) for discussion of topic.

Evidence of prior sexual conduct of victim

State v. Pancake, 296 S.E.2d 37 (1982) (Harshbarger, J.)

See EVIDENCE Sexual conduct, (p. 194) for discussion of topic.

State v. Peyatt, 315 S.E.2d 574 (1983) (McHugh, J.)

See EVIDENCE Sexual conduct, (p. 194) for discussion of topic.

Expert witness

State v. Pancake, 296 S.E.2d 37 (1982) (Harshbarger, J.)

See EVIDENCE Opinion, expert witness, (p. 179) for discussion of topic.

First degree

State v. Wyer, 320 S.E.2d 92 (1984) (Miller, J.)

See SEXUAL ASSAULT Lesser included offense, (p. 551) for discussion of topic.

SEXUAL ASSAULT

Forcible compulsion

State v. Hartshorn, 322 S.E.2d 574 (1985) (Neely, C.J.)

Syl. pt. 1 - Where evidence conclusively establishes that the victim of a sexual assault offered no resistance to his attacker, was neither struck dumb with fear during the assault, nor attempted to utter any plea for assistance, no "earnest resistance" to "forcible compulsion" exists under *W.Va. Code*, 61-8B-1(1) (a) [1976].

Instructions

State v. Richey, 298 S.E.2d 879 (1982) (Miller, J.)

In a sexual assault case, the State offered an instruction which defined sexual intercourse using the statutory language applicable to the facts proved. The defendant objected because it did not contain all the language set out in the statute. The trial court granted the objection and the State offered an instruction which defined sexual intercourse by following the provisions of Code 61-8B-1(7) which covers a variety of sexual acts. On appeal, the defendant objected to the giving of this instruction.

The Supreme Court found no error for several reasons. The defendant brought about its use by his objection to the original instruction. The Court found that although the directive of "invited error" was not directly applicable, it could be viewed of some relevance. The Court also found that although the instruction was broader than it needed to be since it included all of the acts that made up the statutory definition of sexual intercourse, it was not an erroneous statement of law but rather one that might be confusing in view of the fact that it covered legal definitions that were not presented in the evidence. Some of the confusion was clarified by a defense instruction which defined sexual intercourse solely under the facts presented.

Instructions (continued)

State v. Ray, 298 S.E.2d 921 (1982) (Miller, C. J.)

The appellant contended that the trial court erred in giving a State's instruction which referred to corroborating facts and circumstances testified to by other witnesses and that the trial court erred in refusing to give an instruction offered by the defendant which stated that if the jury believed that the case against the defendant rested only on the testimony of the victim, then they should scrutinize her testimony with care.

Syl. pt. 2 - Where the testimony of the victim of a sexual offense is corroborated to some degree, it is not reversible error to refuse a cautionary instruction that informs the jury that they should view such testimony with care and caution.

The Supreme Court found that there was sufficient corroborating under the test set forth in syl. pt. 3, *State v. Vance*, 262 S.E.2d 423 (W.Va. 1980). (See EVIDENCE Corroboration, Accomplice, in Vol. I), and that the defendant's instructional error was without merit.

State v. Wyer, 320 S.E.2d 92 (1984) (Miller, J.)

See SEXUAL ASSAULT Lesser included offense, (p. 551) for discussion of topic.

Jury deliberations

State v. Ray, 298 S.E.2d 921 (1982) (Miller, C.J.)

The appellant contended that the court erred in denying his motion for a mistrial when it became apparent that the jury was considering the age of the victim which had nothing to do with the crime charged. While deliberating, the jury returned to ask if the victim was a minor under W.Va. law on the date of the incident. The trial court informed the jury of the age of the victim and that she was a minor, but refused, despite defense counsel's request, to inform the jury that the victim's age had nothing to do with the case.

Jury deliberations (continued)

State v. Ray, (continued)

The Supreme Court found that the defendant did not claim that the court's instructions to the jury regarding the elements of the crime, which contained nothing about the age of the victim since she was over sixteen, were incorrect. The victim was asked on direct examination what her age was at the time of the alleged crime and she stated that she was seventeen. The defense did not object to that question. The Supreme Court did not find reversible error in the court's subsequent answer to the jury's question as to the age of maturity in this State.

Lesser included offense

State v. Wyer, 320 S.E.2d 92 (1984) (Miller, J.)

See LESSER INCLUDED OFFENSE In general, (p. 374) for discussion of topic.

Appellant was convicted of sexual assault in the first degree. He contends the trial court erred in denying his motion for instructions on lesser included offenses.

After the presentation of evidence, defense counsel requested that the court instruct the jury on lesser included sexual offenses. The Court refused and instructed the jury that they could either find the defendant guilty of sexual assault in the first degree or not guilty.

Syl. pt. 2 - The legislature, by enactment of *W.Va. Code*, 61-8B-3 (a) (1) (1976), relating to sexual assault in the first degree, created a distinction between a voluntary and a nonvoluntary social companion with regard to the elements of the crime of sexual assault in the first degree. Where the victim is a nonvoluntary social companion, the State need prove only that fact and that she was subjected to sexual intercourse by forcible compulsion. Where a voluntary social companion is involved, the State must in addition show either (1) the infliction of serious bodily injury on anyone or (2) the employment of a deadly weapon in the commission of the crime. Finally, where a voluntary social companion is involved and there is sexual inter

Lesser included offense (continued)

State v. Wyer, (continued)

course by forcible compulsion but without either of the foregoing aggravating circumstances, the crime is then sexual assault in the second degree under *W.Va. Code* 61-8B-4 (1976).

The Court found the defendant, at the time the instructions were discussed, asked the court to consider sexual abuse in the first degree under Code 61-8B-6. The Court found the hallmark of this offense is "sexual contact" rather than "sexual intercourse". The Supreme Court found there was no conflict in the evidence that an act of sexual intercourse occurred and therefore, the trial court was correct under *State v. Neider*, in not instructing on sexual abuse.

Recommendation of mercy

State v. Ray, 298 S.E.2d 921 (1982) (Miller, C.J.)

The jury in this case returned a verdict of guilty of first degree sexual assault. At the bottom of the jury form was a recommendation for mercy. The appellant contended that the recommendation for mercy showed a compromise verdict and that the verdict was patently invalid on its face for the reason that there was no provision for recommendation of mercy in first degree sexual assault cases under West Virginia law.

Syl. pt. 4 - Where the law does not give the jury the right to recommend mercy in order to obtain a more lenient sentence, if the jury recommended mercy, this recommendation is treated as surplusage and does not affect the validity of its verdict.

Second degree

State v. Wyer, 320 S.E.2d 92 (1984) (Miller, J.)

See SEXUAL ASSAULT Lesser included offense, (p. 551) for discussion of topic.

SEXUAL ASSAULT

Serious bodily injury

State v. Hartshorn, 322 S.E.2d 574 (1985) (Neely, C.J.)

Syl. pt. 2 - Psychological injury is not a "serious bodily injury" under *W.Va. Code*, 61-8B-3(1)(i) [1976].

Sexual abuse

State v. Wyer, 320 S.E.2d 92 (1984) (Miller, J.)

See SEXUAL ASSAULT Lesser included offense, (p. 551) for discussion of topic.

Variance between indictment and proof

State v. Ray, 298 S.E.2d 921 (1982) (Miller, C.J.)

The appellant contended that the evidence introduced during trial was at variance with the indictment in the case in that the indictment charged that the defendant employed a gun in the commission of the crime while the evidence showed that the defendant's brother, and not the defendant, threatened the victim: with a gun. He also claimed that the trial court erred in giving a State's instruction which informed the jury that the brother's use of a deadly weapon could be attributable to the defendant in the commission of the crime.

"Where there is a combination and conspiracy between two or more persons to commit a crime, if the act of one done in carrying out the common purpose and design terminate in a criminal assault . . . all are liable." Syl. pt. 2, in part, *State v. Wisman*, 93 W.Va. 183, 116 S.E. 698 (1928).

The Supreme Court found that in this case there was ample evidence showing the defendant and his brother were acting in concert at the time of the incident which gave rise to the indictment. The evidence also indicated that the defendant's brother threatened the victim with a pistol to induce her to engage in sexual acts with the defendant. The Supreme Court found that the act of the defendant's brother could properly be attributed to the defendant, and concluded that the assignment of error was without merit.

SPEEDY TRIAL

In general

State v. Foddrell, 297 S.E.2d 829 (1982) (McGraw, J.)

"The right to a trial without unreasonable delay is basic in the administration of criminal justice and is guaranteed by both the state and federal constitutions. *W.Va. Constitution*, Article III, § 14; *U.S. Constitution*, Amendment VI. We have held that it is the duty of the prosecution to provide a trial without unreasonable delay rather than the duty of the accused to demand a speedy trial. *State ex rel. Stines v. Locke*, 220 S.E.2d 443 (W.Va. 1975) and *State ex rel. Farley v. Kramer*, 153 W.Va. 159, 169 S.E. 106 (1969) *State v. Foddrell*, 269 S.E.2d 854, at 858 (W.Va. 1980).

Applies standard set forth in *State v. Foddrell*, 269 S.E.2d 854 (W.Va. 1980). (Found in Vol. I under this topic.)

Magistrate court

State ex rel. Stiltner v. Harshbarger, 296 S.E.2d 861 (1982) (Neely, J.)

Syl. pt. 1 - The speedy trial guarantee of *W.Va.Const*., art. III, § 14 that provides for criminal trials "without unreasonable delay" is applicable to magistrate courts.

Syl. pt. 2 - Ordinarily, unless good cause for delay exists, criminal trials in magistrate court should be commenced within one hundred and twenty days of the issuance of a warrant; however, good cause for delaying a trial beyond one hundred and twenty days must be judged by the standards applicable under *W.Va. Code*, 62-3-1 [1975] to postponements in circuit court beyond one term of court and, consistent with our rules for circuit courts, absence of good cause cannot be presumed from a silent record.

Syl. pt. 3 - Unless one of the reasons specifically set forth in *W.Va. Code*, 62-3-21 [1959] for postponing criminal trials in circuit court beyond three terms of circuit court exists, a criminal trial in magistrate court must be commenced within one year of the issuance of the criminal warrant and lack of good cause for delay beyond one year as defined in *Code*, 62-3-21 [1959] should be presumed from a silent record.

Magistrate court (continued)

State ex rel. Miller v. Fury, 309 S.E.2d 79 (1983) (Miller, J.)

The relator sought writ of prohibition prohibiting prosecution under misdemeanor warrants charging him with driving under the influence of alcohol, second offense, and resisting arrest. He asserted that more than one hundred twenty days had passed since the issuance of warrants and that no prosecution of him had commenced.

Applies standard set forth in syl. pt. 2, *State ex rel. Stiltner v. Harshbarger*, 296 S.E.2d 861 (W.Va. 1982). (Found in Vol. I under this topic.)

Syl. pt. 2 - Before a case can be dismissed in magistrate court for failure to try the same under the one hundred twenty day rule set forth in *State ex rel. Stiltner v. Harshbarger*, 296 S.E.2d 861 (W.Va. 1982), the magistrate must find: (1) that there was no good cause for continuance; (2) that the State has deliberately or oppressively sought to delay the trial beyond the one hundred twenty day period; and (3) that such delay has resulted in substantial prejudice to the accused. Furthermore, the magistrate should dismiss such warrant only in furtherance of the prompt administration of justice.

The Supreme Court found that in this case, while no good cause was shown for the state's delay, there was no indication that the State has deliberately or oppressively sought the delay and there was no indication the delay had caused substantial prejudice to the relator. Accordingly, the writ of prohibition was denied.

Same term rule

State ex rel. Stiltner v. Harshbarger, 296 S.E.2d 861 (1982) (Neely, J.)

See SPEEDY TRIAL Magistrate court, (p. 554) for discussion of topic.

Same term rule (continued)

Pitzenbarger v. Nuzum, 303 S.E.2d 255 (1983) (Neely, J.)

Petitioner and two others were indicted on November 12, 1982 on a charge of embezzlement by a special grand jury. Petitioner appeared before the circuit court on December 6, 1982 to enter a plea of not guilty and to file discovery motions and a motion to sever. These motions were granted and a trial was set for January 6, 1983. On December 27, 1982, petitioner's motion to dismiss the indictment was heard and denied. At the hearing, peti tioner requested a continuance into the January term of court. The motion was granted and the trial was continued generally. Subsequently, a letter dated February 24, 1983 was sent form petitioners Elkins co-counsel to his Charleston co-counsel. In the letter, co-counsel advised that the judge had agreed to schedule the matter for trial on April 5, 1983. Neither the judge nor defense counsel contacted the prosecutors with regard to this trial date. At a hearing on April 4, 1983 it became apparent that neither the judge nor the prosecutor was planning to try petitioner the following day. As of that point, petitioner had filed no motion requesting a speedy trial.

The Supreme Court found the problem in this case was an administrative foul-up caused by a failure of communication, and that the error of the state did not amount to the deliberate oppressive delay that will trigger Code 62-3-1, Syl. pt. 4, State ex rel. *Shorter v. Hey*, 294 S.E.2d 51 (W.Va. 1981). Here, the petitioner did not show the State was without cause to continue the trial, did not show the confusion was not his own responsibility, did not show substantial prejudice from the delay and did not show he was even interested in a quick trial in that he never filed any kind of motion requesting a speedy trial until he made objections at the April 4 hearing. The writ was denied.

Three term rule

State ex rel. Stiltner v. Harshbarger, 296 S.E.2d 861 (1982) (Neely, J.)

See SPEEDY TRIAL Magistrate court, (p. 554) for discussion of topic.

Three term rule (continued)

State v. Foddrell, 297 S.E.2d 829 (1982) (McGraw, J.)

Applying the four-factor test stated in *State v. Foddrell*, 269 S.E.2d 854 (W.Va. 1980). (See SPEEDY TRIAL In general, found in Vol. I under this topic.) The Supreme Court was unable to say that the circuit court erred in determining that the State had used reasonable diligence to secure custody of the appellant for trial. The Court found that although a delay of almost six years between indictment and trial clearly warrants further inquiry, it did not appear that the delay in this case was occasioned by the neglect of the police or prosecuting authorities. The Court also noted that the appellant did nothing to assert his right to a speedy trial, and he failed to show he was prejudiced by te delay.

State v. Bogard. 312 S.E.2d 782 (1984) (Per Curiam)

The appellant contends he was denied his right to a speedy trial since eleven months passed between his arrest and indictment.

The Supreme Court found the length of the delay was not *per se* unreasonable, that the reasons for the delay were legitimate (i.e. continued investigation by police and a change of administration within the prosecutor's office); and that the appellant was unable to demonstrate any prejudice to his case resulting from the delay.

State v. Angel, 319 S.E.2d 388 (1984) (Per Curiam)

Appellant alleged he was denied a speedy trial because more than three terms of court elapsed between reversal of his conviction and retrial. The Supreme Court found all delays of retrial, except one, were attributed to the actions of the appellant and the claim was therefore without merit.

STANDING

To compel prosecution

Myers v. Frazier, 319 S.E.2d 782 (1984) (Miller, J.)

See PLEA BARGAINING In general, (p. 398) for discussion of topic.

To prohibit entry of guilty pleas

Myers v. Frazier, 319 S.E.2d 782 (1984) (Miller, J.)

See PLEA BARGAINING In general, (p. 398) for discussion of topic.

To prohibit grant of immunity

Myers v. Frazier, 319 S.E.2d 782 (1984) (Miller, J.)

See PLEA BARGAINING In general, (p. 398) for discussion of topic.

STATUTES

Constitutionality in general

State v. Less, 294 S.E.2d 62 (1981) (McHugh, J.)

Applies standard set forth in syl. pt. 2 of *State v. Flinn*, 208 S.E.2d 538 (W.Va. 1974) as set forth in *State v. Reed*, 276 S.E.2d 313 (W.Va. 1981). (Found in Vol. I under this topic.)

See CONSPIRACY Constitutionality of statute, (p. 62) for discussion of topic.

Statutory construction

In general

Ohio County Commission v. Manchin, 301 S.E.2d 183 (1983) (Miller, J.)

Syl. pt. 1 - Judicial interpretation of a statute is warranted only if the statute is ambiguous and the initial step in such interpretative inquiry is to ascertain the legislative intent.

State ex rel. Simpkins v. Harvey, 305 S.E.2d 268 (1983) (McGraw, J.)

See DRUNK DRIVING Probation as a sentencing alternative, (p. 142) for discussion of topic.

State v. Warner, 308 S.E.2d 142 (1983) (Miller, J.)

Syl. pt. 1 - "Where the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation." Syllabus point 2, *State ex rel. Underwood v. Silverstein*, 278 S.E.2d 886 (W.Va. 1981), citing Syllabus point 2, *State v. Elder*, 152 W.Va. 571, 165 S.E.2d 108 (1968).

SUFFICIENCY OF EVIDENCE

Circumstantial evidence

State v. Meadows, 304 S.E.2d 831 (1983) (McHugh, J.)

Applies standard set forth in syl. pts. 2 and 3, *State v. Dobbs*, 259 S.E.2d 829 (W.Va. 1979). (Found in Vol. I under this topic.)

Syl. pt. 4 - "The weight of circumstantial evidence, as in the case of direct evidence, is a question for jury determination, and whether such evidence excludes, to a moral certainty, every reasonable hypothesis, other than that of guilt, is a question for the jury." Syllabus point 4, *State v. Bailey*, 151 S.E.2d 850 (W.Va. 1967).

See HOMICIDE Sufficiency of evidence, (p. 236) for discussion of topic.

State v. Williams, 305 S.E.2d 251 (1983) (McGraw, C.J.)

Applies standard set forth in *State v. Noe*, set forth in *State v. Burton*, 254 S.E.2d 129 (W.Va. 1979). (Found in Vol. I under this topic.)

State v. Gum, 309 S.E.2d 32 (1983) (McGraw, C.J.)

Applies standard set forth in syl. pt. 2, *State v. Dobbs*, 259 S.E.2d 829 (W.Va. 1979). (Found in Vol. I under this topic.)

Applies standard set forth in syl. pt. 4, *State v. Meadows*, 304 S.E.2d 831 (W.Va. 1983) cited above.

State v. Watts, 309 S.E.2d 101 (1983) (Per Curiam)

Applies standard set forth in syl. pt. 2, *State v. Dobbs*, 259 S.E.2d 829 (W.Va. 1979). (Found in Vol. I under this topic.)

SUFFICIENCY OF EVIDENCE

Controlled substances

State v. Patton, 299 S.E.2d 31 (1982) (Per Curiam)

See CONTROLLED SUBSTANCES Sufficiency of evidence, (p. 82) for discussion of topic.

Manufacturing

State v. Cabalceta, 324 S.E.2d 383 (1984) (Per Curiam)

See CONTROLLED SUBSTANCES Sufficiency of evidence, Manufacturing, (p. 83) for discussion of topic.

Exclusion of evidence on appeal

State v. Lucas, 299 S.E.2d 21 (1982) (Per Curiam)

See DOUBLE JEOPARDY Sufficiency of evidence, (p. 138) for discussion of topic.

Homicide

See HOMICIDE Sufficiency of evidence, (p. 236) for discussion of topic.

Illegally hindering an officer

State v. Jarvis, 310 S.E.2d 467 (1983) (Harshbarger, J.)

See ILLEGALLY HINDERING AN OFFICER Unlawful fleeing to avoid arrest, (p. 257) for discussion of topic.

SUFFICIENCY OF EVIDENCE

Leaving the scene of an accident

State v. Tennant, 319 S.E.2d 395 (1984) (Miller, J.)

See LEAVING THE SCENE OF AN ACCIDENT Sufficiency of the evidence, (p. 372) for discussion of topic.

Malice

State v. Evans, 310 S.E.2d 877 (1983) (McHugh, J.)

See HOMICIDE Malice, (p. 233) for discussion of topic.

Paternity

State v. Pryor, 304 S.E.2d 681 (1983) (Per Curiam)

See PATERNITY Sufficiency of evidence, (p. 397) for discussion of topic.

Receiving stolen goods

State v. Hall, 298 S.E.2d 246 (1982) (McHugh, J.)

See RECEIVING STOLEN GOODS Elements of the offense, (p. 438); RECEIVING STOLEN GOODS Sufficiency of evidence, (p. 440) for discussion of topic.

State v. Watts, 309 S.E.2d 101 (1983) (Per Curiam)

See RECEIVING STOLEN GOODS Sufficiency of evidence, (p. 441) for discussion of topic.

SUFFICIENCY OF EVIDENCE

Reckless driving

See RECKLESS DRIVING Sufficiency of evidence, (p. 445) for discussion of topic.

Standard for determining

State v. Less, 294 S.E.2d 62 (1981) (McHugh, J.)

Applies standard set forth in syl. pt. 1, *State v. Starkey*, 244 S.E.2d 219 (W.Va. 1978). (Found in Vol. I under this topic.)

State v. Schaefer, 295 S.E.2d 814 (1982) (Per Curiam)

Applies standard set forth in syl. pt. 1, *State v. Starkey*, 244 S.E.2d 219 (W.Va. 1978). (Found in Vol. I under this topic.)

Here, the State's evidence was sufficient to convince impartial minds that the defendant was guilty of voluntary manslaughter beyond a reasonable doubt.

State v. Fairchild, 298 S.E.2d 110 (1982) (McGraw, J.)

Applies standard set forth in *State v. Starkey*, 244 S.E.2d 219 (W.Va. 1979). (Found in Vol. I under this topic.)

State v. Hall, 298 S.E.2d 246 (1982) (McHugh, J.)

Applies standard set forth in syl. pt. 1, *State v. Starkey*, 244 S.E.2d 219 (W.Va. 1978).

State v. Lucas, 299 S.E.2d 21 (1982) (Per Curiam)

Applies standard set forth in *State v. Starkey*, 244 S.E.2d 219 (W.Va. 1978). (Found in Vol. I under this topic.)

SUFFICIENCY OF EVIDENCE

Standard for determining (continued)

State v. Hall, 298 S.E.2d 246 (1982) (McHugh, J.)

Applies standard, in part, set forth in syl. pt. 1, *State v. Starkey*, 244 S.E.2d 219 (W.Va. 1978). (Found in Vol. I under this topic.)

State v. Dameron, 304 S.E.2d 339 (1983) (Per Curiam)

Applies standard, in part, set forth in syl. pt. 1, *State v. Starkey*, 244 S.E.2d 219 (W.Va. 1978). (Found in Vol. I under this topic.)

State v. Meadows, 304 S.E.2d 831 (1983) (McHugh, J.)

Applies standard, set forth in syl. pt. 1, *State v. Starkey*, 244 S.E.2d 219 (W.Va. 1978). (Found in Vol. I under this topic.)

State v. Oldaker, 304 S.E.2d 843 (1983) (Harshbarger, J.)

Syl. pt. 4 - "Upon motion to direct a verdict for the defendant, the evidence is to be viewed in the light most favorable to prosecution. It is not necessary in appraising its sufficiency that the trial court or reviewing court be convinced beyond a reasonable doubt of the guilt of the defendant, the question is whether there is substantial evidence upon which a jury might justifiably find the defendant guilty beyond a reasonable doubt. Syllabus point 4, *State v. Johnson*, 226 S.E.2d 442 (W.Va. 1976)." Syl. pt. 5, *State v. Woods*, 289 S.E.2d 500 (W.Va. 1982).

Landlord was not acting as an agent of the state when he searched his leased garage without a warrant and described the contents to police officers. Evidence seized pursuant to a warrant obtained after the landlord's search was, therefore, admissible. This evidence was sufficient to go to the jury.

Standard for determining (continued)

State v. Cooper, 304 S.E.2d 851 (1983) (Harshbarger, J.)

Applies standard set forth in syl. pt. 1, *State v. Starkey*, 244 S.E.2d 219 (W.Va. 1978). (Found in Vol. I under this topic.)

State v. Williams, 305 S.E.2d 251 (1983) (McGraw, C.J.)

Applies standard set forth in syl. pt. 1, *State v. Starkey*, 244 S.E.2d 219 (W.Va. 1978). (Found in Vol. I under this topic.)

State v. Gum, 309 S.E.2d 32 (1983) (McGraw, C.J.)

Applies standard set forth in syl. pt. 4, *State v. Oldaker*, 304 S.E.2d 843 (W.Va. 1983), cited above.

State v. Watts, 309 S.E.2d 101 (1983) (Per Curiam)

Applies standard set forth in syl. pt. 1, *State v. Starkey*, 244 S.E.2d 219 (W.Va. 1978). (Found in Vol. I under this topic.)

State v. Tadder, 313 S.E.2d 667 (1984) (McHugh, C.J.)

Applies standard set forth in syl. pt. 1, *State v. Starkey*, 244 S.E.2d 219 (W.Va. 1978). (Found in Vol. I under this topic.)

State v. Breeden, 329 S.E.2d 71 (1985) (Per Curiam)

Applies standard set forth in syl. pt. 1, *State v. Starkey*, 244 S.E.2d 219 (W.Va. 1978). (Found in Vol. I under this topic.)

SUFFICIENCY OF EVIDENCE

Standard for determining (continued)

State v. Cabalceta, 324 S.E.2d 383 (1984) (Per Curiam)

Applies standard set forth in syl. pt. 1, *State v. Starkey*, 244 S.E.2d 219 (W.Va. 1978). (Found in Vol. I under this topic.)

Uniform securities act violations

State v. Fairchild, 298 S.E.2d 110 (1982) (McGraw, J.)

See UNIFORM SECURITIES ACT VIOLATIONS Sufficiency of evidence, (p. 572) for discussion of topic.

TRANSCRIPT

Right to transcript

Failure to provide

State v. Neal, 304 S.E.2d 342 (1983) (McHugh, J.)

See TRANSCRIPT What must be transcribed, (p. 567) for discussion of topic.

What must be transcribed

State v. Neal, 304 S.E.2d 342 (1983) (McHugh, J.)

"Under the provisions of *W.Va. Code*, 51-7-1 and -2, all proceedings in the criminal trial are required to be reported; however, the failure to report all of the proceedings may not in all instances constitute reversible error." Syl. pt. 5, *State v. Bolling*, 246 S.E.2d 631 (W.Va. 1978).

On appeal from magistrate court, petitioner was convicted in circuit court of obstructing an officer.

No court reporter was assigned to report the proceedings leading to conviction. Petitioner asserted, among other things, the failure to provide a court reporter inhibited appellant review and was, therefore, prejudicial to him. The state contended that petitioner waived any right he may have had by failing to request a reporter and that no prejudice resulted by failure to record the proceedings.

The Supreme Court found under the provisions of *W.Va. Code*, 51-7-1 (1931), and *W.Va. Code* § 51-7-2 (1931), all proceedings in a criminal trial in circuit court are required to be reported, whether such proceedings relate to felony or misdemeanor charges; however, the failure to report all of the proceedings may not in all instances constitute reversible error.

A criminal defendant does not waive the reporting of the trial proceedings by failing to request a court reporter. In West Virginia no such request is necessary.

What must be transcribed (continued)

State v. Neal, (continued)

Because there was no transcript, the Supreme Court was unable to determine if the circuit court had committed errors assigned by petitioner. Inability to review assignments of error was prejudicial to defendant.

TRANSPORTATION CLAUSE

In general

Ray v. McCoy, 321 S.E.2d 90 (1984) (Neely, J.)

Petitioners were sentenced under state law and confined under contract in the federal facility at Alderson. Both were difficult inmates at Alderson, committing infractions. Both were transferred to federal facilities in California.

Syl. pt. 1 - The clause "[n]o person shall be transported out of, or forced to leave the State for any offense committed within the same," of *W.Va. Const.* art. III, § 5, prevents a prisoner convicted under West Virginia law from involuntarily serving any portion of a state sentence beyond the West Virginia borders.

The Court found W.Va. prisoners, incarcerated in federal facilities in West Virginia, who are punished for breaking prison rules and sent out of state are effectively being punished by banishment and that such action is inconsistent with the transportation clause of the *W.Va. Constitution*.

The Court found transfer makes it difficult to monitor inmate complaints and insure their proper care, and that transfer results in isolation from family and friends which is additional punishment, in effect.

The respondents urged that under *W.Va. Code* 25-1-16 (1972) the petitioners could be transferred beyond the borders of the state if transfer was the best alternative for their care or treatment.

W.Va. Code, 25-1-16 [1972] which authorizes "the state commissioner of public institutions . . .to cause the transfer of any patient or inmate from any state institution or facility to any other state or federal institution or facility which is better fitted for the car or treatment of such patient or inmate, or for other good cause or reason," can be constitutionally applied only to inmate transfers within the State of West Virginia.

The Court found a W.Va. inmate can knowingly and intelligently waive her constitutional right to in-state imprisonment under *W.Va.Const.* art. III, § 5.

Relief in habeas corpus was granted to the petitioners.

UNIFORM SECURITIES ACT VIOLATIONS

Double jeopardy

State v. Fairchild, 298 S.E.2d 110 (1982) (McGraw, J.)

Syl. pt. 8 - To determine whether violations of *W.Va. Code* §§ 32-1-101(1) and (3) committed during an ongoing criminal scheme to defraud constitute the "same offense" under the double jeopardy clause, we look first to the language of the statute to determine if separate offenses, and thus multiple punishments, were intended, and next to the evidence to determine whether there have been separate crimes meriting separate punishments.

The Supreme Court found that an examination of the legislative history of *W.Va. Code* § 32-1-101 indicates that three separately punishable offenses in the context of a single transaction were not intended by the inclusion of the three definitions of prohibited conduct in the three subsections of the statute. The Court found that while it is true that the same transaction may violate two distinct provisions of the same statute or different statutes and be punishable under both as separate substantive crimes, that rule did not apply here, where there are not two distinct provisions of the same statute, but, rather two methods of describing the same statutory offense.

Moreover, the Court found the crimes alleged in counts seven and nine do not involve separate sales of stock to each of the victims, rather the indictment consolidated both sales into a single transaction. Had separate sales been alleged in each count, the appellant's double jeopardy argument would have been substantially weakened.

The Court further found that the fact that different fraudulent representations were alleged in each count did not transform them into separate crimes in light of the evidence which indicated that both statements were made by the appellant Damron at the same meeting with the victims and were intended to effect the same transaction.

The Supreme Court held that counts seven and nine of the indictment were duplicitous and subjected the appellant Damron to multiple punishments for the same offense in violation of double jeopardy principles. The case was remanded for resentencing.

UNIFORM SECURITIES ACT VIOLATIONS

Elements of the offense

State v. Fairchild, 298 S.E.2d 110 (1982) (McGraw, J.)

The appellant contends that the State failed to prove every material element of the charge against him beyond a reasonable doubt. He argued that the State failed in its burden of proving that the securities sold were not subject to any of the statutory exceptions to registration contained in *W.Va. Code* 32-4-402.

The Supreme Court found it necessary to address the issue of whether *W.Va. Code* 32-4-402(d), which puts the burden of proving an exemption upon the person claiming it, unconstitutionally shifts the burden of proof on a material element of the offense to the defendant because all of the requirements of *State v. Pendry*, 227 S.E.2d 210 (W.Va. 1976) and *State v. Harless*, 105 W.Va. 480, 143 S.E.2d 151 (1927) were met below.

The Court found the record revealed the State alleged in the indictment that the securities sold were not exempt from registration, that the State offered proof that the securities were not exempt under *W.Va. Code* 32-4-402(b) (9), the only arguably applicable exemption, and that the trial court instructed the jury that the burden was upon the state to prove beyond a reasonable doubt that the securities were not exempt from the registration requirement.

Indictment

State v. Fairchild, 298 S.E.2d 110 (1982) (McGraw, J.)

The Supreme Court found that the indictment in this case substantially followed the language of *W.Va. Code* § 32-1-101(3) and presented detailed information regarding the time, location, parties involved, victims, and the particular actions of the appellant that constituted a violation of the statute. The Court found the trial court was correct in denying the appellant's motion to quash.

UNIFORM SECURITIES ACT VIOLATIONS

Sufficiency of evidence

State v. Fairchild, 298 S.E.2d 110 (1982) (McGraw, J.)

The appellant, Fairchild, contended that the evidence was sufficient to submit the issue of guilt to the jury because the State failed to show a willful and intentional violation of the law, as required by *W.Va. Code* 32-4-409.

The Supreme Court found that the jury was instructed on several occasions that the State had the burden of provisions beyond a reasonable doubt that the appellant willfully participated in the scheme to defraud. The Court concluded that the evidence, when viewed in the light most favorable to the prosecution, was sufficient to convince impartial minds of the guilt of the appellant beyond a reasonable doubt of a willful violation of the Uniform Securities Act, and that the trial court properly denied the appellant's motion for a directed verdict.

The appellant Damron contended the State failed to meet its burden of proving that the appellant was a broker-dealer as charged in the indictment, and that the securities sold by the appellant were not subject to an exemption from the registration requirement.

The Supreme Court found that the burden upon the State in this case was to prove beyond a reasonable doubt that the appellant was a broker-dealer and not an issuer. The evidence showed that the sales solicited by the appellant were for stock to be issued by the corporation, and not by the appellant in his personal capacity. The Court found that this evidence was sufficient to convince impartial minds that the appellant was a broker-dealer within the terms of the act beyond a reasonable doubt.

The Supreme Court also found that the appellant's contention that the State failed to meet its burden of presenting a *prima facie* case that the securities sold by Damron were not subject to a statutory exemption was without merit. An element of the exemption the appellant claimed required that "no commission or other remuneration is paid or given directly or indirectly for soliciting any prospective buyer in this state . . " . The Supreme Court found that the evidence adduced below showed that the appellant received $1,500 after each sale, and that such evidence is sufficient to negative the claimed exemption.

UNIFORM SECURITIES ACT VIOLATIONS

Variance between indictment and proof

State v. Fairchild, 298 S.E.2d 110 (1982) (McGraw, J.)

The appellant Damron alleged that the State failed to prove beyond a reasonable doubt that acts of fraud and deceit were committed by him. In support of this argument the appellant contended that the allegation contained in the indictment that he represented that the investments would be placed in escrow was not supported by the evidence. The Supreme Court found that the evidence was conflicting on this point, but noted that any variance between the indictment and the proof arising out of this conflict was immaterial.

Syl. pt. 7 - The variance between the indictments and the proof is considered material where the variance misleads the defendant in presenting his defense to the charge and exposed him to the danger of being put in jeopardy again for the same offense.

The Supreme Court found that neither of these dangers is present here.

The appellant Damron also contended that the evidence was insufficient to prove that he represented that dividends would be paid. The Supreme court found this contention was not supported by the record, and that the evidence represented by the state was sufficient to prove a reasonable doubt that acts of fraud and deceit were committed by the appellant.

UNLICENCED WEAPONS

Elements of the offense

State v. Hodges, 305 S.E.2d 278 (1983) (McHugh, J.)

Appellant was convicted under *W.Va. Code* 61-7-1 (1975), which provides, in pertinent part, "[i]f any person, without a state license therefore . . .carry about his person any revolver or pistol . . .or other dangerous or deadly weapon of like kind or character he shall be guilty of a misdemeanor."

Syl. pt. 6 - The absence of a license is an element of the crime of carrying a dangerous or deadly weapon without a license and the burden of proof as to this element must be borne by the State. To the extent it diverges from this opinion, *State v. Merico*, 87 S.E. 370 (W.Va. 1913) is hereby overruled.

The Supreme Court fashioned a guide for the state in proving its case regarding the absence of a license for a dangerous weapon. *W.Va. Code* 61-7-2 (1975) provides the superintendent of the department of public safety is required to maintain a list of all licenses issued within the state. The State's *prima facie* burden to establish the absence of a license to carry a dangerous or deadly weapon is met if a reasonable search reveals that the superintendent of the department of public safety has no record of a license. The defendant may then go forward with evidence showing that he or she did have a valid license, which, for some reason, the State's search of the records did not reveal.

Eligibility for probation

State v. Warner, 308 S.E.2d 142 (1983) (Miller, J.)

See PROBATION Eligibility for probation, (p. 420) for discussion of topic.

VARIANCE

Sexual assault

State v. Ray, 298 S.E.2d 921 (1982) (Miller, C.J.)

See SEXUAL ASSAULT Variance between indictment and proof, (p. 553) for discussion of topic.

Uniform securities act violations

State v. Fairchild, 298 S.E.2d 110 (1982) (McGraw, J.)

See UNIFORM SECURITIES ACT VIOLATIONS Variance between indictment and proof, (p. 573) for discussion of topic.

VENUE

Change of venue

Abuse of discretion

State v. Dye, 298 S.E.2d 898 (1982) (Per Curiam)

The defendant challenged the trial judge's ruling denying his motion for a change of venue. The trial court rejected several affidavits offered by the defendant through which he sought to show strong hostility and prejudice toward him in the community. The notary had mistakenly placed his name in the blank left for the affiant's name. The notary's name was then marked through and the affiant's name written above. The Supreme Court found that while the trial court may have erred in excluding these affidavits, any such error is harmless in view of the detailed pretrial inquiry conducted into the publicity surrounding the trial and the extensive individual *voir dire* accorded the defendant by the trial judge. The Supreme Court found that a close review of the evidence indicated that the trial court did not abuse its discretion in failing to grant the defendant a change of venue.

State v. Audia, 301 S.E.2d 199 (1983) (McHugh, J.)

The appellant claimed the trial court deprived him of his right to a fair and impartial trial by denying his motions for a change of venue based on prejudicial pretrial publicity.

On March 20, 1980, a co-defendant was convicted of the armed robbery. On March 21, 1980, the appellant's trial began. At the conclusion of *voir dire* and after consideration of peremptory strikes, appellant moved for a change of venue on the grounds that ten jurors had been struck because of prejudice, everyone had heard about the co-defendant's conviction, and all had been exposed to some kind of media coverage about the matter. The motion was denied. On appeal the appellant contended that prejudice had so infected the jury that permitting the trial to proceed in that county, following so closely the conviction of the co-defendant, was prejudicial error. The Supreme Court applied the standard set forth in Syl. pt. 1, *State v. Gangwer*, 286 S.E.2d 389 (W.Va. 1982). And found that all of those who expressed any prejudice were excused and that the record supported the trial court's conclusion that the remaining jurors were fair, just and impartial. The Supreme Court found the appellant's contention that the court abused its discretion in failing to summon jurors from other counties was also without merit.

VENUE

Change of venue (continued)

Abuse of discretion (continued)

State v. Williams, 305 S.E.2d 251 (1983) (McGraw, J.)

See VENUE Proof of venue, Standards, (p. 581) for discussion of topic.

State v. Young, 311 S.E.2d 118 (1983) (McGraw, C.J.)

Applies standard set forth in syl. pt. 2, *State v. Gangwer*, 286 S.E.2d 389 (W.Va. 1982). (Found in Vol. I under this topic.)

See VENUE Proof of venue, Standards, (p. 584) for discussion of topic.

State v. Zaccagnini, 308 S.E.2d 131 (1983) (Miller, J.)

See VENUE Change of venue, Standards, (p. 583) for discussion of topic.

Burden of proof

State v. Young, 311 S.E.2d 118 (1983) (McGraw, C.J.)

See VENUE Proof of venue, Standards, (p. 584) for discussion of topic.

Factors to be considered

State v. Ginanni, 328 S.E.2d 187 (1985) (Per Curiam)

Appellant was convicted of sexual abuse in the first degree. He contends the trial court erred in failing to grant his motion for a change of venue. At a hearing on the motion, the appellant presented twenty-one witnesses who were asked if they had knowledge of the appellant's reputation, two said the appellant had a reputation for not being law-abiding, 14 said his reputation was bad or not good, and one said his reputation was mixed. One gave his personal opinion that the appellant was law-abiding. Knowledge of the

State v. Ginanni, (continued)

appellant's bad reputation stemmed from his prior criminal activity, such as spotlighting deer and an earlier sexual assault conviction. Fourteen of the witnesses testified there was present hostile sentiments in the county against the appellant, and five testified that the heard hostile sentiments or negative comments toward the appellant in areas in the county. The State presented three witnesses on the motion. One testified he did not know the appellant, had read about him in the paper and had never heard his name in conversation. The second testified he had never heard of the appellant. The third witness knew the appellant, had not heard any hostile sentiments expressed against him, and had read a newspaper article about appellant's earlier trial.

The Supreme Court found of some importance in a motion for change of venue is the number of jurors who were excused for cause based on the fact that they have formed an opinion. Here, the Court found of the 28 prospective jurors who were initially summoned, seven had already formed an opinion such that they could not render a fair and impartial verdict based solely on the evidence. They were all excused for cause. One prospective juror whose ex-husband's sister was married to the appellant doubted she could be fair and was excused for cause. One more had formed an opinion and was excused. Individual *voir dire* was permitted and as a result of the individual questioning, two more prospective jurors were excused. Of the remaining 19, all except one had heard about the present case or prior cases, through newspaper reports or conversations, or had heard of the appellant's bad reputation. One had heard of the appellant and believed he had a good reputation. After 11 of the first 30 were struck for cause, nine additional persons were summoned. There was not an extensive interrogation of this last group. The panel from which the jury was ultimately selected contained two persons objectionable to the defense whom the trial court refused to strike for cause. The defense attorney renewed the motion for a change of venue during *voir dire* and following individual *voir dire*. The motions were again denied.

The Court applied the standards set forth in syl. pt. 2, *State v. Williams*, 305 S.E.2d 251 (W.Va. 1983), syl. pt. 1, *State v. Pratt*, 244 S.E.2d 227 (W.Va. 1978), and Rule 21 (a) of the W.Va. Rules of Criminal Procedure.

VENUE

Change of venue (continued)

Factors to be considered (continued)

State v. Ginanni, (continued)

Syl. pt. 3 - "The fact that a jury free from exception can be impaneled is not conclusive, on a motion for a change of venue, that prejudice does not exist, endangering a fair trial, and will not justify the court in refusing to receive other evidence to support such motions." Syllabus, *State v. Flaherty*, 42 W.Va. 240, 24 S.E.2d 885 (1806); Syl. pt. 1, *State v. Dandy*, 151 W.Va. 547, 153 S.E.2d 507 (1967).

The Court found none of the trial court's reasons for denying the motion was proper justification for refusing to change venue. The Court found it is not necessary for witnesses at a venue hearing to declare their belief or express their opinion that the accused cannot get a fair trial in the county where the prosecution is taking place. The ultimate legal conclusion is to be determined by the court. Secondly, the Court found, contrary to the court's findings, that the record revealed evidence of hostile sentiment beyond the immediate area of appellant's home community and the evidence was sufficient to show the existence of locally extensive present hostile sentiment against the accused. Third, the Court found the trial court's finding that an impartial jury had been selected in a prior trial of the appellant in that county was immaterial. Finally the Court noted that the fact that a jury free from exception can be impaneled is not conclusive that prejudice does not exist, endangering a fair trial.

The case was reversed and remanded and the Court found if the appellant applies again for a change of venue, consideration of the motion must be guided by the principle that good cause must exist at the time application for a change of venue is made.

Proof of venue

State v. Clements, 334 S.E.2d 600 (1985) (Brotherton, J.)

Appellant was convicted of first degree murder and voluntary manslaughter. He contends the State failed to prove that venue existed in Ohio County where he was indicted since the state could not prove where the two women actually died. The two were last seen in Ohio county, the appellant's van was

State v. Clements, (continued)

spotted later in Marshall county and the women's bodies were found in Brooke County. The Court found in this case the two girls were last seen at a Laundromat in Ohio County. The criminal scheme appears to have started by removing them to a more secluded spot. The Court found this was evidence that the intent to kill was formed in Ohio County. The Court held the State adequately proved venue in Ohio County.

Syl. pt. 2 - Where a crime is committed in more than one county, venue exists in any county in which a substantial element of the offense occurred. *W.Va. Code* § 61-11-12 (1984).

State v. Manns, 329 S.E.2d 865 (1985) (Miller, J.)

Appellant contended there was insufficient evidence to prove the crime occurred in Mercer County.

Syl. pt. 3 - "The State in a criminal case may prove the venue of the crime by a preponderance of the evidence, and is not required to prove the same beyond a reasonable doubt." Syllabus point 5, *State v. Burton*, 163 W.Va. 40, 254 S.E.2d 129 (1979).

The Court found two law enforcement officers familiar with the area where the crime was committed testified the victim's house was in W.Va. and that the State also offered testimony from the victim's brother that he paid property taxes on his brother's house in Mercer County and this was corroborated by an employee of the Mercer County Assessor's Office. The Court found these facts sufficient to prove venue by a preponderance.

Proof of venue (continued)

Standards

State v. Hall, 298 S.E.2d 246 (1982) (McHugh, J.)

Applies standard set forth in syl. pt. 1, *State v. Gangwer*, 286 S.E.2d 389 (W.Va. 1982). (Found in Vol. I under this topic.)

Here, following the searches, an arrest warrant was issued for the appellant. The appellant was visiting a friend at a hospital. As he was leaving, two officers approached him, whereupon the appellant ran into the nearby woods. A manhunt ensued, but the appellant eluded the police. Two county newspapers carried stories of the manhunt which stated that a large amount of stolen property was recovered at appellant's farm and that warrants had been issued for his arrest. The appellant contended that the trial court erred in denying his motion for a change of venue. The Supreme Court found that the appellant failed to show how the alleged "hostile sentiment" manifested itself. For example, he did not cite nor allege any instance of prejudice by potential or actual jurors. In the absence of such showings the appellant failed to show he did not receive a fair trial.

State v. Williams, 305 S.E.2d 251 (1983) (McGraw, J.)

The appellant was convicted of murder, arson, and robbery. The appellant contended on appeal the trial court abused its discretion in refusing his motion for a change of venue based on a number of news articles, letters to the editor and a photograph which appeared in the Welch Daily News from December 8, 1980 to June 10, 1981 which appellant contended were prejudicial.

The Supreme court noted a person accused of a crime may obtain a change of venue "for good cause shown".

State v. Williams, (continued)

"To warrant a change of venue in a criminal case, there must be a showing of good cause therefore, the burden of which rests on the defendant, the only person who, in such case, is entitled to a change of venue. The good cause aforesaid must exist at the time application for a change of venue is made. Whether, on the showing made, a change of venue will be ordered, rests in the sound discretion aforesaid has been abused." Syl. pt. 2, *State v. Wooldridge*, 129 W.Va. 448, 205 S.E.2d 899 (1946).

The Court noted that the extent and characters of adverse pretrial publicity are substantial factors to be considered in determining whether to grant a defendant's motion for a change of venue.

Generally, however, the mere existence of widespread publicity is not, in and of itself, sufficient to require a change of venue, nor is mere proof that prejudice exists against the accused. Rather, the "good cause" which an accused must show to be entitled to a change of venue on the ground of prejudicial pretrial publicity is the existence of a present, hostile sentiment against him, arising from the adverse publicity, which extends throughout the county in which the offense was committed, and which precludes the accused from receiving a fair trial in that county.

In this case, the first series of articles reported only the facts of the death and the subsequent police investigation which culminated in the arrest. A photo showed fire damage to the victim's home. Second series reported the beginning of co-defendant's trial and the prosecutor's opening statements that the co-defendant acted as an accessory while the appellant actually committed the crimes. Another article contained a statement by the prosecutor after the co-defendant's trial, that the jury had been saving the first degree murder conviction for "the other one".

Three letters to the editor were published. The first, written by the co-defendant's mother, criticized his sentence. The second defended the court's sentence. The third, written by the co-defendant, indicated he had not given a statement to the police his "friend" would probably never have been arrested.

VENUE

Proof of venue (continued)

Standards (continued)

State v. Williams, (continued)

The Supreme Court found although some of the newspaper articles and the letters contained references adverse to the appellant, there was no showing made by appellant that their publication generated a hostile feeling against him throughout the community or that he was denied a fair trial, and that the court did not abuse its discretion.

State v. Zaccagnini, 308 S.E.2d 131 (1983) (Miller, J.)

"To warrant a change of venue in a criminal case, there must be a showing of good cause therefore, the burden of which rests on the defendant, the only person who, in any such case, is entitled to a change of venue. The good cause aforesaid must exist at the time application for a change of venue is made.

Whether, on the showing made, a change of venue will be ordered, rests in the sound discretion of the trial court; and its ruling thereon will not be disturbed, unless it clearly appears that the discretion aforesaid has been abused. Point 2, Syllabus, *State v. Wooldridge*, 129 W.Va. 448, 205 S.E.2d 899 (1946). Syllabus Point 1, *State v. Sette*, 242 S.E.2d 464 (W.Va. 1978).

"A present hostile sentiment against an accused, extending throughout the entire county in which he is brought to trial, is good cause for removing the case to another county. Point 2, Syllabus, *State v. Dandy*, 151 W.Va. 547, 153 S.E.2d 507 (1967), quoting point 1, Syllabus, *State v. Siers*, 103 W.Va. 30, 136 S.E. 503 (1927)." Syllabus Point 2, *State v. Sette*, 242 S.E.2d 464 (W.Va. 1978).

The Supreme Court noted that widespread publicity alone does not require a change of venue, nor does proof that prejudice exists against the accused. The critical question is whether the prejudice is so great the accused cannot get a fair trial.

Proof of venue (continued)

Standards (continued)

State v. Zaccagnini, (continued)

Here, defense counsel introduced affidavits containing the same general conclusionary language that the defendant could not obtain a fair trial. The Supreme Court found that affidavits which only state the opinion of the affiant that local prejudice exists will not alone support the granting of a change of venue.

Defense counsel also introduced newspaper articles. The Supreme Court noted that most of the newspaper articles gave factual accounts of the events surrounding the arrest. A statement of opinion was contained on the editorial page of a local paper which referred to a drug arrest but made no mention of the defendant by name. The editorial concluded that the public would view the arrests as an indication that the drug problem was solvable, which would be a step forward.

The Court found significant that, the majority of articles appeared within a month of the arrest, less than one column inch was given to him after the month of the arrest, and it did not appear that his name was mentioned by the paper in trial.

In addition, the trial court permitted defense counsel to question the panel. Ten of 23 were excused for cause. They either expressed some knowledge of the case or were otherwise equivocal about their ability to render an impartial verdict.

The Supreme Court concluded that the trial court did not abuse its discretion in refusing the motion.

State v. Young, 311 S.E.2d 118 (1983) (McGraw, C.J.)

Appellant contended the trial court committed reversible error by refusing to grant a change of venue.

VENUE

Proof of venue (continued)

Standards (continued)

State v. Young, (continued)

The Supreme court found a showing of good cause must be made in order to warrant a change of venue, and the burden of making such showing rests upon the defendant.

Applies standard set forth in syl. pt. 1, *State v. Pratt*, 244 S.E.2d 227 (W.Va. 1978). (Found in Vol. I under this topic.)

Here, the appellant contended the pretrial publicity concerning the death of the victim, the appellant's initial conviction and his subsequent habeas corpus relief and retrial, precluded him from receiving a fair trial in Mason County. In support of his motion, the appellant presented various newspaper articles and two affidavits from citizens in the county stating that public sentiment and hostility precluded the appellant from receiving a fair trial. The trial court denied the motion.

Applies standard set forth in syl. pt. 1, *State v. Gangwer*, 286 S.E.2d 389 (W.Va. 1982). (Found in Vol. I under this topic.)

The Supreme Court found that while "[a] change of venue will be granted in West Virginia when it is shown that there is a present hostile sentiment against the accused, extending throughout the entire county in which he is brought to trial. . . ," Syl. pt. 1, *State v. Peacher*, 280 S.E.2d 559 (W.Va. 1981), the mere existence of pretrial publicity concerning the alleged offense is insufficient to warrant a change of venue. Rather, the publicity must be shown to have so pervaded the populace of the county in such a manner as to preclude a fair trial.

Proof of venue (continued)

Standards (continued)

State v. Young, (continued)

Here, the Court found that while the case was close, there was no clear abuse of discretion of the panel of twenty-eight prospective jurors, twelve neither saw nor heard any medial coverage of the case, seven saw newspaper articles published in 1977, three saw an article published in 1981, four had read articles in 1976 and 1981 and two had read only related headlines. The trial court extensively questioned each prospective juror separately. The Supreme Court was unpersuaded by the fact alone that a change of venue was granted at the appellant's initial trial. Good cause must be shown to exist at the time the motion is made.

VOIR DIRE

In general

State v. Toney, 301 S.E.2d 815 (1983) (Per Curiam)

Excusing challenged jurors to discuss prejudice among themselves did not adequately protect the appellant's right to a meaningful and effective *voir dire*, was not sufficient to reveal any bias or prejudice on the part of individuals in that group, and was entirely improper.

Where trial court conducts a detailed *voir dire* of the jury panel during which each member has an opportunity to indicate both whether he has formed an opinion concerning the defendant's guilt or innocence and whether he can render a fair and impartial verdict upon the evidence, the trial court's exercise of discretion will not be disturbed unless there is a showing that the jury was not impartial.

A criminal defendant is entitled to a meaningful and effective *voir dire* of the jury panel to protect his fundamental constitutional right to a trial by an impartial, objective jury.

General *voir dire* questions addressed to the panel as a whole and not responded to individually until after deliberation among the challenged jurors who were not specific enough to determine bias or prejudice.

State v. Bennett, 304 S.E.2d 35 (1983) (Per Curiam)

Syl. pt. 2 - "The true test as to whether a juror is qualified to serve on the panel is whether without bias or prejudice he can render a verdict solely on the evidence under the instructions of the court." Syl. pt. 1 *State v. Kilpatrick*, 210 S.E.2d 480 (W.Va. 1974).

In general (continued)

Fluharty v. Wimbush, 304 S.E.2d 39 (1983) (Per Curiam)

The fact that the trial court conducted *voir dire* did not unduly limit the proceeding where the trial judge accepted *voir dire* questions reasonably calculated to determine whether jurors were impartial and he examined the panel to determine if any juror had an interest in the case, was biased or prejudiced, or had formed an opinion about the case. Further, the trial judge did not refuse to permit a more probing inquiry of any member who expressed possible bias or prejudice.

Moreover, counsel did not object to the procedure when the judge outlined it in chambers.

Thorton v. Pushkin, 305 S.E.2d 316 (1983) (Miller, J.)

Syl. pt. 1 - *Voir dire* examination is designed to allow litigants to be informed of all relevant and material matters that might bear on possible disqualifications of a juror and is essential to a fair and intelligent exercise of the right to challenge either for cause or peremptorily. Such examination must be meaningful so that the parties may be enabled to select a jury competent to judge and determine the facts in issue without bias, prejudice or partiality.

State v. Simmons, 309 S.E.2d 89 (1983) (Miller, J.)

The appellant contended the trial court unreasonably rejected some of her proposed *voir dire* questions. The Supreme court found that the few questions that were refused by the trial court were substantially covered by other questions that were used in *voir dire* and there was no error on this point.

VOIR DIRE

Abuse of discretion

State v. Toney, 301 S.E.2d 815 (1983) (Per Curiam)

Syl. pt. 2 - "It is an abuse of discretion and reversible error for the trial judge, in the exercise of his discretionary control over the scope of inquiry during *voir dire*, to so limit the questioning of potential jurors as to infringe upon a litigant's ability to determine whether the jurors are free from interest, bias or prejudice or to effectively hinder the exercise or peremptory challenges." Syl. pt. 5, *State v. Peacher*, 280 S.E.2d 559 (W.Va. 1981).

Trial judge abused his discretion and committed reversible error in denying appellant's request for individual *voir dire* after nine jurors admitted they had served on the jury of a previous drug related trial where an undercover police officer had testified about the same drug transaction for which appellant in this trial was being tried.

The trial court improperly restricted the *voir dire*.

State v. Bennett, 304 S.E.2d 35 (1983) (Per Curiam)

See JURY Challenges, Cause, (p. 322) for discussion of topic.

Fluharty v. Wimbush, 304 S.E.2d 39 (1983) (Per Curiam)

Applies standard set forth in syl. pt. 5, *State v. Peacher*, 280 S.E.2d 559 (W.Va. 1981) quoted in *State v. Toney*, 301 S.E.2d 815 (W.Va. 1983), cited above.

State v. Williams, 305 S.E.2d 251 (1983) (McGraw, C.J.)

See *VOIR DIRE* Scope, (p. 594) for discussion of topic.

State v. Ashcraft, 309 S.E.2d 600 (1983) (McGraw, C.J.)

See *VOIR DIRE* Individual, (p. 591) for discussion of topic.

VOIR DIRE

Individual

State v. Neider, 295 S.E.2d 902 (1982) (Miller, C.J.)

The Supreme Court recognized the rule that having some knowledge of the case does not automatically disqualify a juror.

"A trial court must inquire beyond a simple and direct questioning of a juror as to whether he can decide a case fairly and impartially after having read news articles related to the trial of the case. Specific questions should be asked in order to determine whether a juror, even without his own knowledge, may be biased or prejudiced." Syl. pt. 6, *State v. Williams*, 230 S.E.2d 742 (W.Va. 1976).

In this case, during *voir dire*, in response to a question as to whether any of the veniremen had read anything about the crime charged, a veniremen indicated that he had read about a recent jailbreak. Upon continued questioning of the panel, several other veniremen indicated that they had read about the jailbreak. Following disclosure of this, the Court permitted defense counsel to conduct an individual examination of each of the veniremen who had indicated some knowledge of the article. The examinations failed to bring out specifically what was contained in the article or articles about the jailbreak. The record of the individual *voir dire* did not demonstrate that the veniremen had any specific knowledge regarding the jailbreak.

The Supreme Court found that the trial court correctly followed the law set forth in *Williams*, *supra*, by permitting detailed individual *voir dire* of the veniremen who acknowledged seeing the newspaper article. The Court could not conclude from the record that the veniremen to whom defense counsel objected and who were permitted to remain on the panel were unable to render a verdict solely on the evidence adduced during the trial.

State v. Toney, 301 S.E.2d 815 (1983) (Per Curiam)

Trial court's failure to strike challenged jurors merely because at a previous trial they had been exposed to testimony concerning appellant's drug activity was not, in itself, reversible error.

Individual (continued)

State v. Toney, (continued)

The error was in refusing to allow individual *voir dire* to determine the extent to which that prior testimony might have prejudiced jurors.

Applies standard set forth in syl. pt. 3, *State v. Pratt*, 244 S.E.2d 227 (W.Va. 1978). (see *State v. Schrader*, 288 S.E.2d 170 (W.Va. 1982), found in Vol. I under this topic.)

State v. Simmons, 301 S.E.2d 812 (1983) (Per Curiam)

Applies standard set forth in syl. pt. 3 of *State v. Pratt*, 244 S.E.2d 227 (W.Va. 1978). (See *State v. Schrader*, 288 S.E.2d 170 (W.Va. 1982). (Found in Vol. I under this topic.)

State v. Ashcraft, 309 S.E.2d 600 (1983) (McGraw, C.J.)

Appellant alleged the trial court erred in refusing defense counsel's request for individual *voir dire* of the jury panel members. The trial court denied defense counsel's requests, directing counsel to question the jury panel collectively. The trial court stated that individual *voir dire* would be permitted if, in the court's opinion, it appeared necessary.

The Supreme Court noted that questioning by defense counsel revealed a number of prospective jurors with possible prejudice or bias. Four prospective jurors had family members employed by law enforcement agencies. Four prospective jurors were acquainted with the prosecutor - one attended his church, one was a neighbor, one was a friend and the prosecutor was married to a cousin of one prospective juror. Seven members of the panel had read newspaper articles concerning the previous trial of the appellant's co-defendant, which resulted in the co-defendant's conviction for murder. One prospective juror's grandmother may have served on the grand jury that returned the indictment charging the appellant with murder. Another was the neighbor of a defense witness. Another was a neighbor of a witness for the prosecution. Trooper Frum was a neighbor to one prospective juror and had returned a stolen toolbox to another.

Individual (continued)

State v. Ashcraft, (continued)

The Supreme Court found that the refusal of the trial court to permit individual *voir dire* deprived appellant of his right to trial by an impartial and objective jury.

Applies standard set forth in syl. pt. 3, *State v. Pratt*, 244 S.E.2d 227 (W.Va. 1978), (See *State v. Schrader*, 288 S.E.2d 170 (W.Va. 1982). (Found in Vol. I under this topic.)

The Supreme court noted it is a fundamental tenet of due process, guaranteed by the sixth and fourteenth amendments to the U.S. Constitution and by article III, § 14 of the W.Va. Constitution that a criminal defendant is entitled to insist upon a jury "composed of persons who have no interest in the case, have neither formed nor expressed any opinion, who are free from bias or prejudice, and stand indifferent in the case." *State v. McMillion*, 104 W.Va. 1, 138 S.E. 732, 735 (1927).

The Supreme Court noted that, pursuant to *W.Va. Code* 56-6-12, the examination of prospective jurors by the trial court is a matter of right. The court may permit counsel for either party to conduct *voir dire* and the trial court may properly limit the extent of *voir dire* to inquiries related to qualification. The trial court's exercise of discretion in determining the extent of inquiry on *voir dire* is not normally subject to review on appeal, but is limited by the requirements of due process and may be reviewed in a case of abuse. The Supreme Court noted that whether the refusal of a trial court to permit individual *voir dire* of prospective jurors constitutes an abuse of discretion necessarily depends upon the facts of the case.

Here, the Supreme Court noted that the jury panel was asked questions on *voir dire* which revealed numerous relationships which presented the potential for bias or prejudice. After eliciting this information, counsel requested individual *voir dire* to determine if the admitted relationship created impermissible bias or prejudice. The court refused counsel's request for individual *voir dire*. The Supreme Court found that *State v. Pratt*, 244 S.E.2d 227 (W.Va. 1978) and *State v. Pendry*, 227 S.E.2d 210 (W.Va. 1976) clearly indicate that it is an abuse of discretion not to permit individual questioning when a jury reveals a relationship that suggests potential for bias

Individual (continued)

State v. Ashcraft, (continued)

or prejudice. The Court found that while none of the jurors answered affirmatively when asked collectively by defense counsel if their relationships, acquaintances, or exposure to newspaper articles would influence their decision in the case, the jurors' responses could not be taken as conclusive on the issue.

The Supreme Court found it had consistently held that a meaningful and effective *voir dire* of the jury panel is necessary to effectuate the fundamental right to a fair trial by an impartial and objective jury. Given the gravity of the offense in this case (murder) and the demonstrated possibilities for prejudice of bias revealed by counsel's preliminary questions, the Supreme Court believed it was an abuse of discretion and reversible error for the trial court to preclude individual *voir dire* of the jury panel.

State v. Beckett, 310 S.E.2d 883 (1983) (Miller, J.)

Applies standard set forth in syl. pt. 3, of *State v. Pratt*, 244 S.E.2d 227 (W.Va. 1978),(See *State v. Schrader*, 288 S.E.2d 170 (W.Va. 1982), found in Vol. I under this topic.)

State v. Angel, 319 S.E.2d 388 (1984) (Per Curiam)

Appellant contends he was prejudiced by the court's denial of his request for individual *voir dire*, in chambers, of prospective jurors who had read a newspaper article concerning appellant's prior conviction at his first trial.

Syl. pt. 3 - "In a criminal case, the inquiry made of a jury on its voir dire is within the sound discretion of the trial court and not subject to review, except when the discretion is clearly abused." Syl. pt. 2, *State v. Bearcraft*, 126 W.Va. 895, 30 S.E.2d 541 (1944).

The Supreme Court found the appellant was provided effective individual *voir dire* of those jurors who had read the article. The Court found no abuse of discretion in the trial court's refusal to permit the questioning to occur in chambers.

VOIR DIRE

Scope

State v. Toney, 301 S.E.2d 815 (1983) (Per Curiam)

The trial court, in the exercise of its discretion, determines the method and scope of *voir dire*.

See *VOIR DIRE* Abuse of discretion, (p. 589) for discussion of topic.

Fluharty v. Wimbush, 304 S.E.2d 39 (1983) (Per Curiam)

The trial judge had broad discretion to conduct *voir dire*, *W.Va. Code* 56-6-12, utilizing any procedure that will better determine the impartiality of jurors and permit intelligent and meaningful peremptory challenges.

The trial judge's discretion about the scope of *voir dire* is not boundless.

Applies standard set forth in syl. pt. 5, *State v. Peacher*, 280 S.E.2d 559 (W.Va. 1981) quoted in *State v. Toney*, 301 S.E.2d 815 (W.Va. 1983). See *VOIR DIRE* Abuse of discretion. (Found in Vol. I)

State v. Williams, 305 S.E.2d 251 (1983) (McGraw, C.J.)

Appellant was convicted of murder, arson and robbery. The appellant alleged error concerning the trial court's limitation of the scope of *voir dire*. Defense counsel attempted to ask if any of the potential jurors would not be willing to recommend mercy for a person convicted of first degree murder. The prosecutor objected and the court sustained the objection.

The Supreme Court found that the scope of the *voir dire* examination is generally a matter within the sound discretion of the trial court and is not subject to review except for abuse of discretion. *State v. Bearcraft*, 126 W.Va. 895, 30 S.E.2d 541 (1944). However, the court may not so limit the examination so as to deprive the accused of his right to trial by a jury composed of persons with no interest in the case and who are free from bias and prejudice. *State v. Peacher*, 280 S.E.2d 559 (W.Va. 1981); *State v. Pratt*, 244 S.E.2d 227 (W.Va. 1978). The defendant's right to an adequate and meaningful *voir dire* of prospective jurors includes the right to inquire into

Scope (continued)

State v. Williams, (continued)

any matter which is reasonably related to a possible challenge for cause or to a fair and intelligent exercise of his peremptory challenges. *State v. Pendry*, 227 S.E.2d 210 (W.Va. 1976); *West Virginia Human Rights Commission v. Tempin Lounge, Inc*., 211 S.E.2d 349 (W.Va. 1975).

The Court found it is generally recognized that where a jury in a criminal trial is vested with the discretion to fix the penalty to be imposed in the event the defendant is found guilty, the right of the defendant to an impartial jury includes the right to a jury free from prejudice respecting the penalties which may be imposed upon a finding of guilt. *See e.q.*, *U.S. v. Puff*, 211 F.2d 171. (2nd Cir.), *cert denied*, 347 U.S. 963, 74 S.C. 713, 98 L.Ed. 1106, *reh. denied*, 347 U.S. 1022, 74 S.Ct. 876, 98 L.Ed. 1142, *reh. denied*, 348 U.S. 853, 75 S.Ct. 20, 99 L.Ed. 672 (1954). The Court noted the question has arisen most often in context of capital cases, where it has been held that both the defendant and the State may inquire of the prospective jurors during *voir dire* whether any of them has any unalterable prejudice against or in favor of the imposition of the death penalty. *State v. Henry*, 196 La. 217, 198 So. 910 (1940); *State v. McClellan*, 12 Ohio App. 2d 204, 232 N.E. 414 (1967); *Patterson v. Commonwealth*, 222 Va. 653, 283 S.E.2d 212 (1981). But *see Rollins v. State*, 148 So. 2d 274 (Fla. 1963).

Syl. pt. 7 - A defendant charged with murder of the first degree is entitled to question potential jurors on *voir dire* to determine whether any of them are unalterably opposed to making a recommendation of mercy in any circumstances in which a verdict of guilty is returned.

The Court noted that the purpose of such questioning should be to discover whether any prospective juror holds any personal, moral, religious or philosophical beliefs, convictions, scruples or opinions which would preclude them from considering the imposition of a particular penalty in the event of conviction regardless of the circumstances of the case. The Court found the inquiry must go to the willingness of the prospective jurors to exercise their discretion to determine the penalty. Counsel may not use the *voir dire* to suggest a verdict to the jury or to elicit a commitment from the jury to return a particular penalty in the event of conviction. The question should be specific enough to adequately inform the jury of the substance of counsel's inquiry.

Scope (continued)

State v. Williams, (continued)

The Supreme Court found in this case that counsel did not specifically inquire into whether any of the prospective jurors would be unwilling to make a recommendation of mercy in *any* circumstances in which an accused was found guilty of first degree murder.

Counsel made no attempt to explain to the jury that they were vested with the discretion to make the recommendation or the consequences of such recommendation. The question was too vague to elicit the proper information. The Court found the record did not show an abuse of discretion which would warrant reversal.

WARRANTS

Arrest

Who may issue

State ex rel. Mill v. Smith, 305 S.E.2d 771 (1983) (Harshbarger, J.)

See ARREST Warrant, Who may issue, (p. 30) for discussion of topic.

Discovery

State v. Sheppard, 310 S.E.2d 173 (1983) (McGraw, C.J.)

See DISCOVERY Indictment, (p. 116) for discussion of topic.

WELFARE FRAUD

Intent

State v. Lambert, 312 S.E.2d 31 (1984) (McGraw, J.)

See INSTRUCTIONS Court's responsibility for, (p. 300) for discussion of topic.

WITNESSES

Competency of children to testify

State v. Watson, 318 S.E.2d 603 (1984) (Miller, J.)

The appellant alleged the trial court erred in allowing an eleven year old to testify claiming she was too young to be a competent witness.

The Supreme Court found the trial court held an *in camera* hearing and it appeared the child answered questions intelligently and demonstrated an understanding of what it meant not to tell the truth. The Court found no abuse of discretion in allowing her to testify.

Compulsory process/confront witnesses

In general

Naum v. Halbritter, 309 S.E.2d 109 (1983) (Neely, J.)

See EVIDENCE Hearsay-exceptions, Declaration against penal interest, (p. 173) for discussion of topic.

Confidential informant

State v. Bennett, 304 S.E.2d 35 (1983) (Per Curiam)

See DISCOVERY Informant, (p. 117) for discussion of topic.

Sexual conduct

State v. Peyatt, 315 S.E.2d 574 (1983) (McHugh, J.)

See EVIDENCE Sexual conduct, (p. 194) for discussion of topic.

WITNESSES

Cross-examination

State v. Richey, 298 S.E.2d 879 (1982) (Miller, C.J.)

Syl. pt. 4 - Several basic rules exist as to cross-examination of a witness. The first is that the scope of cross-examination is coextensive with, and limited by, the material evidence given on direct examination. The second is that a witness may also be cross-examined about matters affecting his credibility. The term "credibility" includes the interest and bias of the witness, inconsistent statements made by the witness and to a certain extent the witness' character. The third rule is that the trial judge has discretion as to the extent of cross-examination.

See WITNESSES Impeachment, Credibility, (p. 604) for discussion of topic.

State v. Hall, 304 S.E.2d 43 (1983) (Neely, J.)

See WITNESSES Impeachment, Prior convictions, (p. 609) for discussion of topic.

State v. Gum, 309 S.E.2d 32 (1983) (McGraw, J.)

Applies standard set forth in syl. *State v. Wood*, 280 S.E.2d 309 (W.Va. 1981). (Found in Vol. I under this topic.)

State v. Peyatt, 315 S.E.2d 574 (1983) (McHugh, J.)

See EVIDENCE Sexual conduct, (p. 194) for discussion of topic.

Depositions

State v. Trail, 328 S.E.2d 671 (1985) (Brotherton, J.)

Appellant was convicted of misdemeanor battery. Appellant, by counsel, moved the circuit court to order the taking of a deposition of her former roommate, who had since moved to Florida. The court denied the motion. Appellant contends this was reversible error.

WITNESSES

Deposition (continued)

State v. Trail, (continued)

Syl. pt. 1 - "Where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not." Syl. pt. 8, *State v. Zaccagnini*, 308 S.E.2d 131 (W.Va. 1983), quoting *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306, 309 (1932).

Syl. pt. 2 - "In a criminal case, the granting or denial of a motion for continuance rests in the sound discretion of the trial court and the refusal to grant such continuance constitutes reversible error only where the discretion is abused." Syl. pt. 4, *State v. Milam*, 159 W.Va. 691, 226 S.E.2d 433 (1976).

The Court noted *W.Va. Code* 62-6A-3 (1937) provides that out-of-state witnesses can be subpoenaed in their states for criminal trials in W.Va. The Court found in this case there is no evidence that the appellant made any attempts to subpoena the potential witness nor did the appellant demonstrate that she was unable to procure her attendance by subpoena. On the contrary, only on the day of appellant's trial did counsel move for a continuance to gain time to bring the witness to W.Va. He claimed the appellant had been in contact with her. The Court found the trial court was correct in denying such an untimely motion since it was obvious the potential witness was not "unable" to appear as a witness in the circuit court.

The Court found the trial court correctly ruled since there was no showing of "exceptional circumstance", even as that term might be liberally construed, that would necessitate the taking of a deposition in the course of a criminal proceeding under *W.Va.R.Crim.P.* 15(c) and made no motion under *W.Va. Code* 62-3-1 (1981).

Hostile

State v. Kopa, 311 S.E.2d 412 (1983) (McHugh, J.)

See WITNESSES Impeachment, Prior inconsistent statements, (p. 614) for discussion of topic.

WITNESSES

Impeachment

In general

State v. Foster, 300 S.E.2d 291 (1983) (Neely, J.)

In a trial for murder, the appellant claimed self-defense. To prove the defense, the appellant had to impeach the testimony of a witness who testified that the victim was unarmed when shot. Appellant contended that he sought to impeach the witness' testimony by showing the witness had injected cocaine into himself prior to the shooting. The Supreme Court agreed with the appellant's argument that the witness was subject to impeachment on the basis of being under the influence of cocaine; however, this was not the trust of the defense's cross-examination. Defense counsel was interested in whether the appellant was using cocaine, and his questioning of the witness was for the purpose of ascertaining whether the drug appellant used was in fact cocaine. The Supreme Court found that while the trial court may have been overly strict in not permitting the witness to testify to this, it was not a basis for reversal.

Most evidence is not *per se* either admissible or inadmissible; rather, it is admissible or inadmissible in relation to a theory or fact sought to be proved.

Syl. pt. 1 - It is not reversible error for a court to refuse to admit evidence, admissible for one purpose but not for another, where only the latter purpose is asserted at trial by the party seeking its admission.

The Supreme Court found the damage the trial court's refusal to admit the evidence may have done to a possible impeachment of the witness on the basis of his own use of cocaine could not be asserted on appeal, since the evidence was not sought for this purpose at trial.

State v. Hall, 329 S.E.2d 860 (1985) (Miller, J.)

The Court noted impeachment of a witness can occur by several methods. One is cross-examination on a prior inconsistent statement. Another technique is to offer a witness whose testimony is inconsistent with the first witness's.

Impeachment (continued)

Acquittal by reason of insanity

State v. Gum, 309 S.E.2d 32 (1983) (McGraw, C.J.)

The appellant was convicted of first degree murder. On appeal he alleged error in the admission into evidence of a prior criminal charge in which one of his witnesses was acquitted of murder by reason of insanity.

"Questions maybe asked by witnesses as to convictions, both felonies and misdemeanors, in order to test the witness' credibility." Syl. pt. 3, *State v. Woods*, 155 W.Va. 344, 184 S.E.2d 130 (1971).

The Supreme Court noted that in syl. pt. 1, *State v. McAboy*, 160 W.Va. 497, 236 S.E.2d 431 (1977) they limited the type of crimes that may be used to impeach a criminal defendant's credibility, but made clear that they do not alter our existing law in regard to other witnesses. As to other witnesses, the rule is that it rests within the sound discretion of the trial court.

In this case there was no conviction. The witness had been acquitted of the criminal charges by reason of insanity. The Supreme Court noted that other courts have held that verdicts of not guilty by reason of insanity are not admissible as prior conviction impeachment evidence.

The Court noted that evidence of the witness' acquittal by reason of mental illness was sufficient to show a psychiatric disability affecting his credibility. See WITNESSES Impeachment, Evidence of psychiatric disability, (p. 607) for discussion of topic.

The Court found however, the admission of evidence concerning the witness' acquittal by reason of mental illness does not automatically constitute reversible error. The Court found that the testimony of the appellant's witness was an extremely portion of his defense and that even taking everything the witness testified to as true, the remaining evidence was sufficient to support the appellant's conviction. Additionally, the Court found the appellant voiced no specific objection at trial nor alleged any prejudicial effect on appeal which would support a conclusion that the testimony elicited affected the outcome of the case. The Court noted the State did not emphasize this testimony. Therefore, the Court concluded any error committed in allowing the State to question the appellant's witness

WITNESSES

Impeachment (continued)

Acquittal by reason of insanity (continued)

State v. Gum, (continued)

concerning his acquittal by reason of mental illness was harmless under *Atkins*. See (Main text) HARMLESS ERROR Nonconstitutional, Standard for determining (p. 219).

Credibility

State v. Richey, 298 S.E.2d 879 (1982) (Miller, C.J.)

See WITNESSES Cross-examination, (p. 600) for discussion of topic.

In this case the specific area is whether a witness can be cross-examined as to allegedly falsified records of a corporation of which he is president. Since the falsified records were not relevant to an issue in the case, the Supreme Court found it was clear that the line of inquiry was designed to discredit the witness' character by attacking his credibility.

"The usual method of impeaching the credibility of a witness as one who will not tell the truth and is trust worthy if belief is to show the bad general reputation of the witness for truth and veracity in the community where she lives, by impeaching witnesses who knew that reputation." Syl. pt. 3, in part, *State v. Driver*, 88 W.Va. 479, 107 S.E. 189 (1921).

The Supreme Court noted there is also authority that permits a witness to be cross-examined about particular acts that directly bear on his veracity. The rule is often discussed under a more general topic relating to impeachment of a witness by cross-examination of prior acts of misconduct for which there has been no criminal conviction. Ordinarily, cross-examination is limited in this area.

The Supreme Court noted they have permitted impeachment of a witness by prior acts of misconduct but have stressed that if "[1] the cross-examination relates to a recent transaction or conviction [2] *bearing directly* upon the *present* character and moral principles of the witness, and [3] therefore

Impeachment (continued)

Credibility (continued)

State v. Richey, (continued)

essential to the due estimation of his testimony by the jury. . . .[4] the Court may permit the inquiry, within reasonable limits" . . . .*State v. Price*, 113 W.Va. 326, 167 S.E. 862 (1933).

The Court found it was not necessary to determine how far the cross-examination of a witness should be allowed for prior acts of misconduct that do not bear upon his truth and veracity. The modern trend is to limit such cross-examination.

In this case, the Supreme Court found the cross-examination of the witness was appropriate since it involved the witness' participation in and knowledge of falsification of records. This was a test of the witness' character for truth and veracity. The Court found that the witness was permitted to give a full explanation of the circumstances which exonerated him, and, consequently, found no error on this point.

State v. Peyatt, 315 S.E.2d 574 (1983) (McHugh, J.)

See EVIDENCE Sexual conduct, (p. 194) for discussion of topic.

Death of a witness

State v. Hall, 329 S.E.2d 860 (1985) (Miller, J.)

Appellant was convicted of murder. The conviction was remanded on appeal. On appeal from the circuit court's decision on remand, the appellant contended the state withheld exculpatory evidence on discovery - a taped interview of the state's chief witness and the only eye-witness to the crime, Russell Green. The Supreme Court agreed this tape should have been disclosed and granted relief in habeas corpus. Since the initial trial, the state's chief witness died. The Supreme Court found the state could

State v. Hall, (continued)

introduce Green's trial testimony at a subsequent trial, but that the more interesting question was the defendant's right to use the inconsistent tape which was discovered after the first trial.

Syl. pt. 2 - Prior trial testimony is admissible as an exception to the hearsay rule under Rule 804(b)(1) of the West Virginia Rules of Evidence. Therefore, impeachment by reason of an inconsistent statement is available under Rule 806 of the West Virginia Rules of Evidence.

The Court found it appears to be generally recognized that where a deceased witness's testimony is introduced at trial through his prior trial testimony or by way of deposition, then such testimony may also be impeached through that witness's prior inconsistent statement. The Court found this area is now more developed in this state as a result of the adoption of Rule 806 of the Rules of Evidence. The Court noted this rule, in essence, state that as to any hearsay statement which is admitted in evidence, "the credibility of the declarant may be attacked, and if attacked may be supported by any evidence which would be admissible for those purposes if the declarant had testified as a witness." The Court found the language of the rule makes it clear that a "statement or conduct by the declarant at any time, inconsistent with his hearsay statement" is not subject to the traditional requirement of affording the declarant an opportunity to explain or deny the inconsistency.

The Court found there is no doubt but that on a retrial Green's prior trial testimony is admissible as an exception to the hearsay rule under Rule 804(b)(1) of the W.Va. Rules of Evidence, and that therefore, impeachment by reason of his inconsistent statement is available under Rule 806.

WITNESSES

Impeachment (continued)

Defendant

State v. Clements, 334 S.E.2d 600 (1985) (Brotherton, J.)

Appellant had been convicted of a violation of 18 U.S.C. § 922 (a) (6) (1976), which involves a false statement or presentation of a false identification in connection with the acquisition of a firearm. The trial court allowed the prosecution to introduce evidence of this conviction to impeach the appellant's credibility, even though appellant had not put his character in issue. Appellant contends the prior conviction should have been excluded under the rule set out in syl. pt. 1 of *State v. McAboy*, 160 W.Va. 497, 236 S.E.2d 431 (1977).

Syl. pt. 9 - In the trial of a criminal case, a defendant who elects to testify may have his credibility impeached by showing prior convictions of perjury or false swearing and criminal convictions of making false statements with intent to deceive, but it is impermissible to impeach his credibility through any other prior convictions.

The Court found because 18 U.S.C. §922 (a) (6) meets this requirement the lower court was correct in its ruling to allow impeachment by that offense.

Evidence of psychiatric disability

State v. Gum, 309 S.E.2d 32 (1983) (McGraw, C.J.)

Although "[e]vidence of psychiatric disability may be introduced when it effects the credibility of a material witness' testimony in a criminal case[,] [b]efore such psychiatric disability can be shown to impeach a witness' testimony, there must be a showing that the disorder effects the credibility of the witness and that the expert has had a sufficient opportunity to make the diagnosis of psychiatric disorder." Syl. pt. 5, *State v. Harman*, 270 S.E.2d 146 (W.Va. 1980).

Impeachment (continued)

Indictment or arrest

Porter v. Ferguson, 324 S.E.2d 397 (1984) (Harshbarger, J.)

Footnote 7 - "[I]n no event, upon effort to discredit a witness on cross-examination, is it proper to ask him if he has been indicted for, or otherwise charged with an offense. Mere accusation should carry no stigma. One is presumed to be innocent until his guilt is proved. The postulate of the law is not mere hollow form or deceitful phrase. It is one of the basics guarantees of American citizenship and must be treated as such." *State v. Price*, 113 W.Va. 326, 334-335, 167 S.E. 862, 866 (1933). See also *United States v. Pennix*, 313 F.2d 524 (4th Cir. 1963); *Simon v. United States*, 123 F.2d 80 (4th Cir.), *cert denied*, 314 U.S. 694, 62 S.Ct. 412, 86 L.Ed. 555 (1941); 81 Am.Jr.2d *Witnesses* § 587 (1976). *But see State v. Woods*, 155 W.Va. 344, 184 S.E.2d 130 (1971), *overruled on other grounds*, *State v. McAboy*, 160 W.Va. 497, 236 S.E.2d 431 (1977), allowing an exception where the arrest would show bias or influence of the witness against the other party.

One's own witness

State v. Spence, 313 S.E.2d 461 (1984) (Per Curiam)

Appellant was convicted of grand larceny. The defense called Roy Clark, relying on his statement to the police in which he contradicted state witness Mike Clark's testimony. When defense counsel put Roy Clark on the stand and he changed his testimony from that he had given to the police, the defense attempted to question him about the prior statement. The trial judge sustained the State's objection to such questioning.

Applies standard set forth in syl. pt. 4, *State v. Kopa*, 311 S.E.2d 412 (W.Va. 1983). (Found in Vol. I under WITNESSES Impeachment, Prior inconsistent statements.)

The Supreme Court found the record indicates the defendant was surprised by the adverse testimony of a witness who appeared to have favorable testimony on several critical point in the State's case. The Court found under the rule in *Kopa*, the trial court should have permitted the defense to impeach the witness even though he was called by the defense.

WITNESSES

Impeachment (continued)

Prior convictions

State v. Hall, 304 S.E.2d 43 (1983) (Neely, J.)

At trial the state's eyewitness was allowed to testify against appellant even though the state failed to provide requested information about the witness' criminal record thereby restricting cross-examination and possible impeachment. The case was remanded for determination of the prejudicial effect of this noncompliance on the appellant's ability to impeach the witness.

In this case, the eyewitness' testimony carried many "indicia of unreliability." The eyewitness had been indicted for this murder, an accomplice's uncorroborated testimony is inherently suspect; and factual discrepancies were apparent in the State's case and the witness' testimony.

Where "the case contains a number of substantial key factual conflicts . . . there is an increased probability that an error will be deemed prejudicial."

The Supreme court noted an appeals court may properly pass on the validity of the jury's conclusion for the purpose of assessing the weight of the verdict against the magnitude of the error.

In this case, the prosecution's refusal to supply appellant with the eyewitness' criminal record precluded impeachment of a vital witness. The magnitude of this error measured against the weight of the verdict suggested that reasonable doubt might have ben created by even insubstantial impeachment.

The Court noted evidence of a felony record or record of a misdemeanor involving moral turpitude may have a substantial effect on a jury's decision. The State's refusal to provide such record would be reversible error.

Impeachment (continued)

Prior convictions (continued)

State v. Beckett, 310 S.E.2d 883 (1983) (Miller, J.)

The appellant contended on appeal the prosecutor improperly impeached a defense witness on a past criminal conviction. The Supreme Court noted that in his motion for a new trial, the defendant, for the first time, contended this was improper impeachment because the criminal charge against the witness was still pending in court. The Supreme Court found the failure of the defendant to make a timely objection foreclosed consideration of this point on appeal, although they noted that the witness admitted in her testimony that she had in fact already been convicted of the crime referred to by the prosecutor.

Prior inconsistent statements

State v. Sparks, 298 S.E.2d 857 (1982) (Per Curiam)

The appellant contended that the trial court erred in allowing the prosecutor to impeach his own witness without laying a proper foundation and to use leading questions in his examination of the witness.

The Supreme Court found that while as a general rule a party may not impeach his own witness, when through entrapment, hostility or surprise a party is misled or prejudiced by the testimony of his own witness, he may impeach his own witness to the extent permitted by the trial court in the exercise of its discretion. Further, "[a] party who is surprised by unfavorable testimony given by his own witness may interrogate such witness as to previous inconsistent statements made by him." Syl. pt. 5, *State v. Ferguson*, 270 S.E.2d 166 (W.Va. 1980).

State v. Sparks, (continued)

In this case, the Supreme court found that the testimony of the witness at trial was contrary to statements previously made by him, and to the State's expectations of what his testimony would be. This was a sufficient showing of surprise and a proper foundation for the prosecutor's questions regarding the previous inconsistent statements. The Supreme court also found that although an examination of the record revealed that the prosecutor may have asked a number of somewhat leading questions of the witness, the Court did not find them to be improper in light of the witness' largely monosyllabic responses and his apparent reluctance to testify against his brother. The court held that the questioning was proper and the trial court did not abuse its discretion in permitting it.

State v. Foster, 300 S.E.2d 291 (1983) (Neely, J.)

Syl. pt. 2 - Where there is a conflict between the constitutional rights of a criminal defendant and technical rules concerning order of proof, the rules concerning order of proof must yield to the defendant's right to a fair trial.

Here, the trial court refused to admit a letter written by a witness which contradicted his testimony at trial and corroborated the testimony of the appellant. The appellant claimed self-defense at trial. The witness never testified on direct or re-direct as to whether the victim was armed. When called as a rebuttal witness, he testified the victim was unarmed. When the defense sought to impeach this testimony with the contradicting letter, the court sustained the prosecutor's objection. There were statements in the letter that contradicted elements of the witness' direct and re-direct testimony, and the trial court ruled that the letter should have been used to impeach the witness when he originally testified. Because the letter impeached elements of the witness' direct testimony, the trial court ruled it could not be admitted during rebuttal. The trial court *sua sponte* suggested that the "witness could, by the admission of this letter be charged with another violation of the law." The trial judge appointed an attorney for the witness and stated that it would be necessary for the witness to probably plead the Fifth Amendment and the Court would uphold his right and find the letter to be inadmissible.

Impeachment (continued)

Prior inconsistent statements (continued)

State v. Foster, (continued)

The Supreme Court found reversible error. The Supreme Court found that while the letter may have been inadmissible during rebuttal for the purpose of impeaching the witness' testimony on direct, it was clearly admissible for the purpose of impeaching the witness' testimony on rebuttal, and was offered for that purpose.

The supreme court found a criminal defendant has a broad right to impeach prosecution witnesses on cross-examination with prior inconsistent statement. While the scope of cross-examination is generally with the discretion of the trial court and usually limited to matters brought out on direct, the trial court may not control the scope of cross-examination so far as to prejudice the defendant. The right to an effective cross-examination is an integral part of the confrontation clause of the Sixth Amendment and this right does not yield to a Rhadamanthine application of court rules governing order of proof.

The Supreme court found that the single piece of evidence most damaging to the appellant's claim of self-defense was the testimony of the sole eyewitness that the victim was unarmed when appellant shot her. To forbid the defense to enter into evidence a prior inconsistent statement of the prosecution's star witness on this very matter was to deny the appellant a fair trial. The Supreme Court found that the trial court's affirmative action in building for the prosecution Fifth Amendment barricades to protect the impeaching letter relieved the Court of any hesitancy in requiring a new trial.

State v. Cochran, 310 S.E.2d 476 (1983) (Per Curiam)

The appellant contended his conviction for breaking and entering should be reversed because the trial court admitted a confession of his co-defendant over his objection and in violation of our rules of evidence.

Impeachment (continued)

Prior inconsistent statements (continued)

State v. Cochran, (continued)

A co-defendant had pleaded guilty to the charge and indicated he would testify for the State. The co-defendant refused to testify for fear of retaliation in the penitentiary because of being a "snitch". He did not assert any privilege which would excuse him from testifying. The State asked him if he had made a statement to the police concerning the burglary. He testified he vaguely remembered the contents of the statement. After that, he would not answer any other questions.

Over the State's and the defendant's objections, the court directed the State to read the statement to the witness in the presence of the jury. The statement implicated the defendant. The witness still refused to answer any questions and the defendant did not attempt to cross-examine.

The trial court instructed the jury the statement could not be considered in determining guilt or innocence but should only be used for determining the credibility of the witness.

Applies standard set forth in syl. pt. 1, *State v. Spadafore*, 220 S.E.2d 655 (W.Va. 1975). See *State v. Kopa*, 311 S.E.2d 412 (W.Va. 1983), cited below.

Syl. pt. 2 - "Prior out-of-court statements may be used to impeach the credibility of a witness and a prior inconsistent statement may be introduced concerning any specific matter about which the witness has testified at trial; however, where the witness does not testify contrary to his prior statement but demonstrates an absence of memory, such prior statement must be used sparingly to demonstrate lack of integrity in the witness or the reason for surprise to the party which calls him, but these legitimate purposes may not be used as a ruse for introducing inadmissible evidence." Syllabus point 2, *State v. Spadafore*, 220 S.E.2d 655 (W.Va. 1975).

The Supreme Court found the trial court erred in permitting the witness to be impeached by his *ex parte* out-of-court statement. His refusal to acknowledge his earlier statement resulted in no factual testimony that could be impeached.

State v. Cochran, (continued)

The Court found that in view of their disposition of this case on evidentiary grounds, they declined to discuss the Sixth Amendment confrontation issue.

State v. Kopa, 311 S.E.2d 412 (1983) (McHugh, J.)

Appellant contended the trial court erred when it permitted the prosecution to impeach its own witness with a prior inconsistent statement that was unsworn and which the prosecution knew would be refuted at trial. During trial the prosecution called the appellant's girlfriend. She had given a statement to police. At the preliminary hearing, before the grand jury and at trial she denied the truth of a portion of the statement. The trial judge permitted the prosecution to impeach her testimony with the prior inconsistent statement.

The trial judge determined the appellant's girlfriend had become hostile toward the prosecution during her direct examination and allowed the prosecution to impeach her with the prior inconsistent statement. At the request of the appellant the jury was admonished that the prior inconsistent statement of the girlfriend could only be considered for credibility purposes and nor for the truth of the matter asserted.

The Supreme court found the better rule is embodied in Rule 607 of the Federal Rules of evidence and held:

Syl. pt. 4 - The credibility of a witness may be attacked by any party, including the party calling him and prior cases that expound a contrary principle are hereby overruled.

The Court noted that the adoption of Rule 607 does not free either party to introduce otherwise inadmissible evidence into trial under the guide of impeachment.

Impeachment (continued)

State v. Kopa, (continued)

The Court found that since the trial judge admonished the jury to only consider the prior inconsistent statement for credibility purposes and not for its truth the trial court did not violate the standards set forth in syl. pt. 1, *State v. Spadafore*, 220 S.E.2d 655 (W.Va. 1975):

> "In a criminal case prior out-of-court statements made by a witness cannot be admitted into evidence for the truth of the matter asserted unless they were made under oath in a judicial atmosphere during the taking of a deposition or at a former trial and were subject at the time to cross-examination by the opposing party's counsel."

State v. Simmons, 309 S.E.2d 89 (1983) (Miller, J.)

See SELF-INCRIMINATION - STATEMENTS BY DEFENDANT Voluntariness, Use in evidence, (p. 533) for discussion of topic.

Testimony of magistrate presiding at initial trial

State v. Tennant, 319 S.E.2d 395 (1984) (Miller, J.)

The appellant contends it was error to call the magistrate who presided over his initial trial to impeach him. The appellant testified he suffered certain injuries as the result of a car accident. The magistrate testified he could not recall the defendant making such a statement at the earlier proceeding.

The Supreme Court questioned whether this was valid impeachment evidence. The case was reversed on other grounds and the Court found the impeachment issue could easily be avoided on retrial by not calling the magistrate.

WITNESSES

Leading questions

State v. Fairchild, 298 S.E.2d 110 (1982) (McGraw, J.)

Syl. pt. 6 - The allowance of leading questions rests largely in the discretion of the trial court, and absent an abuse of such discretion, the trial court's ruling will not be disturbed.

The Supreme court found that although the record indicated that numerous leading questions were employed by the prosecution, in the vast majority of these instances the use of leading questions was not objected to by defense counsel, The Court found the record indicated that of the objections to leading questions that were made, the majority were sustained. The Supreme Court concluded that defense counsel's failure to object to leading questions may have been a valid tactical choice, but in any event, he could not raise the issue for the first time on appeal.

Rebuttal

State v. Boykins, 320 S.E.2d 134 (1984) (Per Curiam)

The appellant contended the trial court abused its discretion by permitting the prosecution to call a rebuttal witness who had not been listed in discovery answers and of which the defense had not been given notice. The Supreme Court found any error in admission of this testimony was harmless in view of other properly admitted evidence more damaging to the appellant's alibi defense.

YOUTHFUL OFFENDERS ACT

In general

State ex rel. Simpkins v. Harvey, 305 S.E.2d 268 (1983) (McGraw, C.J.)

See DRUNK DRIVING Probation as a sentencing alternative, (p. 142) for discussion of topic.

Imprisonment of female offenders in youthful male offender facilities

Flack v. Sizer, 322 S.E.2d 850 (1984) (Harshbarger, J.)

Relator plead guilty to uttering a forged check and was sentenced to the Federal Correctional Institution at Alderson for one to ten years. At the time of the guilty plea she was twenty years old. Relator requested that in lieu of imprisonment, she be sentenced to probation or be assigned to a youthful offender facility pursuant to *W.Va. Code* 25-4-1, et. seq. The motion was apparently never ruled upon and relator was transferred to Alderson to begin serving her sentence.

Syl. pt. 1 - Statutory classifications that distinguish between males and females are subject to scrutiny under both the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States and the guarantee of the equal protection in Article III, Section 17 of the West Virginia Constitution.

Syl. pt. 2 - "Gender based classification challenged as denying the right to equal protection guaranteed by Article III, Section 17 of the West Virginia Constitution are to be regarded as suspect, accorded the strictest possible judicial scrutiny, and are to be sustained only if the State can demonstrate a compelling interest to justify the classification." Syllabus point 2, *Peters v. Narick*, 270 S.E.2d 760, (W.Va. 1980).

Syl. pt. 3 - *W.Va. Code*, 25-4-2, *et seq*., violates the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States and the guarantee of equal protection of the laws in Article III, Section 17 of the West Virginia Constitution.

Syl. pt. 4 - *W.Va. Code*, 25-4-1, *et seq*., is to be applied in a gender-neutral fashion that will give both males and females the opportunity to be sentenced as youthful offenders under its terms.

YOUTHFUL OFFENDERS ACT

Imprisonment of female offenders in youthful male offender facilities (continued)

Flack v. Sizer, (continued)

The State contended relator did not make a timely request to be sentenced as a youthful offender and the trial court was not given an opportunity to rule on the issue. The Supreme Court found the relator's request was in her motion for reconsideration of sentence taken under advisement by the circuit court. The Court found there was, however, no record of a hearing or ruling by the trial court on the motion, and that they were therefore unable to determine whether relator was unconstitutionally denied youthful offender status solely because of gender. The Court remanded to the circuit court with directions that a hearing be conducted and a ruling be made on relator's motion for reconsideration of sentence.

Transfer from youthful offender center to penitentiary

Admission of hearsay evidence

State v. Stuckey, 324 S.E.2d 379 (1984) (Per Curiam)

The law has been summarized as holding: "Although a revocation of probation may not be based on hearsay evidence alone, a revocation of probation will stand even though hearsay evidence was introduced at a hearing, provided there was additional competent evidence sufficient to support the revocation." 21 Am. Jr. 2d *Criminal Law* § 579 (1981). The Court found this statement is supported by a majority of cases. *See* Annot., 11 A.L.R. 4th 999 (1982). The Court found it is applicable to a transfer under the youthful offender statute, *W.Va. Code*, 25-4-6, where the offender faces resentencing, because of the close analogy to a probationary hearing, as we have pointed out in *Watson*.

Syl. pt. 2 - "We have generally defined hearsay as where a witness testifies in court wit regard to out-of-court statements of another for the purpose of proving the truth of the matter asserted." Syllabus point 9, *State v. Richey*, 298 S.E.2d 879 (W.Va. 1982).

The Court found the evidence presented by the state before the circuit court was clearly hearsay. The witness who testified was an officer at the Anthony Center who had participated in the hearing at which it was determined that

YOUTHFUL OFFENDER ACT

Transfer from youthful offender center to penitentiary (continued)

Admission of hearsay evidence (continued)

State v. Stuckey, (continued)

the appellant was unfit to remain at the Center. She testified as to the nature of the appellant's behavior that gave rise to the transfer although she had not witnesses the incident. Thus, the court found the entire testimony was hearsay.

The Court found that, as in probation or parole revocation proceedings, a circuit court dealing with a returned offender from a center for youthful offender should address two questions: first, whether the offender is unfit to remain at the center; and, second, if it is determined that he is, whether the circuit court should hear evidence on the question of disposition. The Court found on the basis of that evidence, the circuit court should determine what disposition should be made of the offender. The Court found in this case, the circuit court erred in failing to consider evidence on the dispositional question.

Due process rights

State v. Stuckey, 324 S.E.2d 379 (1984) (Per Curiam)

Syl. pt. 1 - "A youthful male offender, sentenced to confinement in a special center pursuant to *W.Va. Code*, 25-4-6, is entitled to a evidentiary hearing when he is returned, as unfit, to the sentencing court and faces resentencing to the penitentiary; and he is entitled to counsel to assist him in the hearing before the sentencing court." Syllabus point 2, *Watson v. Whyte*, 162 W.Va. 26, 245 S.E.2d 916 (1978).

The Court found they also stated in *Watson* that an offender is entitled to the minimum due process requirements applicable to probation revocations as prescribed in *Gagnon v. Scarpelli*, 411 U.S. 778 (1973) and that these rights include the right to confront and cross-examine adverse witnesses unless the hearing officer specifically finds good cause for not allowing such confrontation.

TABLE OF AUTHORITIES

PAGE(S)

CASES SUMMARIZED

TABLE OF AUTHORITIES

PAGE(S)

CASES CITED IN TEXT